(1)
Supreme Court, U.S.
FILED
04 178 JUN 1 - 2004
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOSE DEYNES-TORRES, et al.
Petitioners

vs.

UNITED STATES OF AMERICA, et al.
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeal For The First Circuit

PETITION FOR WRIT OF CERTIORARI

José Deynes-Torres et al.
Attorney injured and Petitioner
PRO-SE
P.O. Box 8178
Bayamón, Puerto Rico 00960
Tel/Fax: 787-784-6003
Cel: 787-315-7044
e-mail: Law55@37.com

I. QUESTIONS PRESENTED

In a constitutional republic like the United States of America, acts by officials are legitimate only if they are consistent with and based on a Constitution, a body of Law which are superior to all subsequent *statutes* and other acts of officials, which embodies all delegations of power, and which may recognize certain rights to further define the limits on the power delegated. It is fundamental principle that all *Acts* of officials not derived from the delegated powers of the *Constitution* are null and void.

Whether Petitioners action would be stopped even before it began, due to the Federal Tort Claim Act (FTCA's) rule that it cannot be based on a discretionary Act.

Whether the government Misrepresentation and Misconduct constitute "fraud upon the court."

Whether the allegations set forth claims which are precluded by the discretionary function or misrepresentation exception are question of law or whether the action is a matter of claim for the acting employees' and officers of the court.

II. LIST OF PARTIES

JOSE DEYNES-TORRES et al.
Attorney injured and Petitioner PRO-SE
P.O. Box 8178
Bayamón, Puerto Rico 00960
Tel/Fax: 787-784-6003
Cel: 787-315-7044
e-mail: Law55@37.com.

Lisa Bhatia Gautier
Assistant U.S. District Attorney
Respondent For United States Of America
Torre Chardon Suite 1201
350 Carlos Chardon Street
San Juan, Puerto Rico 00918

Attorney Francisco E. Colon Ramirez
Respondent for Disabled American Veteran
Bank Trust Plaza, Suite 1201
255 Ponce de León Ave.
San Juan, Puerto Rico 00917-1926

III. TABLE OF CONTENTS

Part I.	Questions Presented	i
Part II.	List Of Parties.....	ii
Part III.	Table Of Contents.....	iii
Part IV.	Index Of Appendices.....	iv -v
Part V.	Table Of Authorities Cited.....	vi-vii
Part VI.	Constitutional Statutory Provisions.....	viii
Part VII.	Jurisdiction.....	ix
Part VIII.	Statement Of The Case.....	1-12
Part IX.	Reasons For Granting The Writ.....	12-24
	A. The Administrative Procedure	13
	B. The Reversible decision.....	14-18
	C. The Discretionary Function Exception..	19-24
Part X.	Conclusion.....	25

IV. INDEX TO APPENDICES

		PAGE:
Appendix A.	The Appellate Court Judgment.....	26-28
Appendix B.	Report and Recommendation.....	29-31
Appendix C.	District Court Order.....	32-33
Appendix D.	Final Judgment.....	34
Appendix E.	The 1992 Board Of Veteran Appeal Reversible Decision.....	35-40
Appendix F.	The Fabricated Fraudulent Sworn Sworn Statement Predicated by the The Government since 1988.....	41-43
Appendix G.	Field Examination Request.....	44
Appendix H.	Report Of Field Examination.....	45-46
Appendix I.	Psychiatric Examination Report....	47-48
Appendix J.	October 6, 1989 Administrative Tort Claim SF 95 C.F.R. 14.2 And Certification.....	49-50
Appendix K.	Disabled American Veteran Petitioner Deynes Appeal Before The Board Of Veteran Appeal.....	51-52
Appendix L.	VA Rating Decision, Factual Legal Arguments And Evidence Filed to the Board Of Veteran Appeal.....	53-54

Appendix M.	Certification Documents Request By Petitioner Deynes of his Veteran File.....	55
Appendix N.	Statement By Petitioner Deynes..	56
Appendix O.	Second Administrative Tort Claim Dated January 10, 2001 with Motion To Set Aside Opinion...	57-59
Appendix P.	Counsel Robin Letter from the Board Of Veteran Appeal.....	60-62
Appendix Q.	Counsel For Respondent Unite States Informative Motion Substitution Of Fabricated Evidence For Translation in English of The Same Fabricated Evidence.....	63-69
Appendix R.	Petitioner Opposition to Informative Motion.....	70-72
Appendix S.	Order Requesting Loan Guaranty Division Petitioner Deynes File And The Original Sworn Statement.	73
Appendix T.	Motion In Compliance with Order	74-78
Appendix U.	Motion Requesting Disqualification Of Judge under 28 U.S.C. S 455(a)	79-81
Appendix V.	Order: The same Judge Petitioners Request be Disqualified under the 28 U.S.C. S 455(a) once again ruled against the law and against the facts.	82

V. TABLE OF AUTHORITIES CITED

A. Federal Case

Art-Metal v. United States,
753 F. 2d at 1158..... 15
Berkovitz v. United States
486 U.S. 531 (1988)..... 15-16
Beroni v. United States,
662 F. 2d 287 (5th Cir. 1981)
Cert. denied, 460 U.S. 1036 (1983)..... 21
Block v. Neal,
460 U.S. 289 (1983)..... 21
Boyle v. United Technologies Corp.,
487 U.S. 500, 108 S. Ct. 250 (1988)..... 18
Bulloch v. United States,
763 F. 2d 1115, 1121 (10th Cir. 1985)..... 6
Dous v. United States
522 F. 2d 990 (6th Cir. 1975)..... 15
F.D.I.C. v. Meyer,
510 U.S. 471, 478, 1145Ct. 996, 1001 (1994)..... 14
Griffin v. United States,
500 F. 2d 1059 (3d Cir. 1974)..... 15
Guild v. United States,
685 F. 2d 324, 325 (9th Cir. 1982)..... 20
Hazel-Atlas Glass Co. v. Hartford Empires Co.,
322 U.S. 238, 64 S. Ct. 997,1000,88 L. ed. 1250..... 6
In Re: Meyer,
510 U.S. at 477..... 15
In Re: Muniz,
374 U.S. at 164..... 17
Irving v. United States,
162 F. 3d 154, 162 (1st Cir. 1998)..... 16
Kenner v. C.I.R.
387 F. 3d 689 (1969)..... 10

Kuejci v. U.S. A. Material Dev. R. Command.,
773 F. 2d 1278 (7th Cir.) cert. denied.,
469 U.S. 918 (1984)..... 21
Lambertson v. United States,
528 FR. 2d 441, 443 (2d Cir. 1976)..... 20
Levine v. United States,
362 U.S. 610, 80 S. Cy. 1038 (1960)..... 11
Magee v. United States,
121 F. 3d 1,6 (1st Cir. 1967)..... 14
Maine v. Thiboutot,
100 S. Ct. 250..... 11
Nemmers v. United States,
795 F. 2d 628, 632 (7th Cir. 1986)..... 23
Rufino Muniz-Rivera v. United States,
Court Of Appeal For The First Circuit NO. 02-2011..... 16
Summers v. United States,
905 F. 2d 1212 (9th Cir. 1990)..... 15
United Airlines, Inc. v. Wiener
335 F. 2d 379 (9th Cir. 1964)..... 15
United States v. Bosch Oldsmobile, Inc.,
909 F. 2d 657, 661 (1st Cir. 1990 10
United States v. Gaubert
499 U.S. 315, 322-23 (1991)..... 16
United States v. Kubrick,
444 U.S. 111 (1979)..... 23
United States v. Scinto,
521 F. 2d 842-845 (7th Cir. 1996)..... 11
United States v. Varig Airlines,
467 U.S. 797, 809-10 (1984)..... 16
Weldon v. United States, (Weldon1),
745 F. Supp. 408 (N.D.C.Y. 1990)..... 17
Weldon v. United States (Weldon 11),
845 F. Supp. 72,74 (N.D.N.Y 1994)..... 17
Zelenick v. United States,
770 F. 2d 20, 23 (3d Cir. 1985)..... 20

VI. CONSTITUTIONAL STATUTORY PROVISIONS

Article vi, Clause 3 U.S. Constitution..... 11

7 Moore F.P.P., 2d ed., P. 512, 60.23..... 10

7 Moore F.P.P. 60.33 Supp. 60.38(1) 60.398-399... 6

28 U.S.C. Section 455(a)..... 11

28 U.S.C. 1346(b)(1)..... 14-16

28 U.S.C. Section 2401(b)..... 13-23

28 U.S.C. Section 2402..... 3

28 U.S.C. Section 2671-2680..... 14-15

28 U.S.C. Section 2675(a)..... 13

28 U.S.C. Section 2680(a)..... 19

28 U.S.C. Section 2680(h)..... 20-21

SF 95 C.F.R. 14.2..... 3-13

38 U.S.C. Section 110..... 1

38 C.F.R. 2.344(a)..... 2

Rule 60(b)(4)..... 10-11

VII. JURISDICTION

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully prays that a writ of certiorari issue to review the judgment bellow:

The opinion of the United States Court of Appeal for the First Circuit dated April 1, 2004, before Boudin, Chief Judge, Selya and Lipez. The opinion appears at e.g Appendix A page # 26 to 28 of the petition and is unpublished.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

VIII. STATEMENT OF THE CASE

1. As attorney at law and injured in this case this is so much the worse and must reprehensible Miscarriage of Justice ever encounter committed by employees' and Officer of the court who ruled against the law and against the fact, obstructing justice under the auspices of fraud at law against the rule of law. We explain:

2. Petitioner Deynes served this country with proud in the United States Army from 1968 to 1970. He received the must highly commendation in recognition of meritorious performance in the Republic of Vietnam, the President Medal and Purple Hearts Medals. He was prisoner of War and wounded in three occasions. He also received a Honorable Discharge. Petitioner Deynes was granted full compensation benefits from the Veteran Administration (from now on Veteran Affair or VA) since 1970 for a service connected incapacity due to his mental and physical traumas incurred while serving in the Republic Of Vietnam.

3. The Factual Legal Events giving rise to this tragedy commenced on 1988 when the employees' from the Department of Veteran Affair Loan Guaranty Division performed a nondiscretionary function, actively conceal its own wrongdoing by misrepresentation and created a breach of duty when fabricated a fraudulent sworn statement and submitted as evidence to the Veteran Affair Pension Unit. ***Please see e.g. Appendix F page 41-43 and T page 74-78.***

4. The employees' from VA performed a nondiscretionary function, actively conceal its own wrongdoing by misrepresentation and created a breach of duty when admitted and used the fabricated evidence as a cornerstone to curtailed Petitioners benefits. Outrageous, this event occurred 3 months before his permanent in nature with 20 years with his pension as specified in 38 U.S.C. 110.

5. On March 17, 1988, Maritza Ramos, Adjudication Officer from VA, performed a nondiscretionary function, actively conceal its own wrongdoing by misrepresentation and created a breach of duty when request from Antonio Aponte, VA Service Officer, a "field examination" regarding Petitioner Deynes business based on information that appear on the fabricated fraudulent sworn statement. Mrs. Ramos firmly stated on her request that "information was received from the Loan Guaranty Division showing that Petitioner Deynes been involved in business." She also firmly stated "for more information about this matter please refer to veteran sworn statement notarized on April 1987 in file. ***See e.g .Appendix G page 44, F page 41-43 and T page 74-78.***

6. On April 21, 1989, Mr. Nicolas De La Torre performed a nondiscretionary function, actively conceal its own wrongdoing by misrepresentation, and created a breach of duty when the information he used behind the desk on his report was the fabricated evidence. ***Please see e.g. Appendix H page # 45-46..***

7. On July 7, 1989, VA submitted the completed veteran Deynes file with the fabricated evidence to Dr. Miriam Marti to evaluated Petitioner Deynes condition. Dr. Marti performed a nondiscretionary function, actively conceal its own wrongdoing by misrepresentation and created a breach of duty, acting by and through its attending physician failed to exercise a proper degree of care in the treatment of Petitioner Deynes during her labor. It is obvious that the agency of original jurisdiction has violated the intent and purpose of the regulatory provision [1].

---

[1] 38 C.F.R. 2.344(a) (a veteran scheduler 100% percent service connected disability rating could not be reduced, in the absence of clear error, without examination showing material improvement in the mental condition.

This reduction was based on one time examination and subsequently improper. Rating on account of diseases subject to temporary or episodic improvement, manic depressive, or other psychotic reaction or many diseases, will not be reduced in a one-time examination. There are genuine issues of material fact existed regarding whether the government had fraudulently concealed act of Medical Malpractice on Petitioner Deynes. The report by Dr. Miriam Marti on Petitioner Deynes evaluation was based on a fabricated sworn statement because the original sworn statement Do Not Exist. ***See e.g. Appendix I page # 47-48.***

8. On October 6, 1989 Petitioner Deynes filed his first Administrative Tort Claim [2] for Personal Injury before the Department of Veteran Affair. ***See e.g. Appendix J page 49-50.***

9. On March 30, 1992, two years after Petitioner Deynes Appeal (Petitioner Appeal on October 10,1989) Disabled American Veteran (from now on DAV) filed Petitioner Deynes Appeal. DAV who represented Petitioner Deynes throughout the administrative proceeding and which engaged as attorney at law for all legal purpose, committed severe wrongdoing by misrepresentation and misconduct toward Deynes by permitting in fraudulent matter the admission of said evidence which for all legal purpose are fraudulent and null. Moreover, the attorney for DAV never argued or challenged, don't even in one page the fabricated fraudulent sworn statement. ***See e.g. Appendix K page 51-52.***

---

[2] 28 U.S.C. Section 2402 (1994) (the requirement to file an administrative claim is a jurisdictional prerequisite to suit under the FTCA; the claimant must file the administrative claim with the agency and allow the agency at least six-months to adjudicate the claim before filling a lawsuit against the United States (SF 95 C.F.R. 14.2).

10. On November 11, 1990, VA filed the statement of fact (RO) for consideration to the Board of Veteran Appeal (from now on BVA) with the fabricated fraudulent sworn statement for evaluation. The employees' from VA once again firmly stated that information was received from the Loan Guaranty Division.

11. On July 22, 1992 , BVA [d]enied Petitioner Deynes appeal. Attorney Erkembrack an administrative law judge in charge of Petitioner Deynes decision, firmly stated "that his decision was based on a sworn statement of the veteran" were stated that veteran been involved in a travel agency business. Attorney Erkembrack an administrative law judge performed a nondiscretionary function, actively conceal its own wrongdoing by misrepresentation and created a breach of duty when admitted and used the substance of VA evidence (the fabricated sworn statement) for the purpose of evaluated VA defense.

The Legal Argument by this officer of the court was based on a knowingly false representation of law constitutes dishonestly towards the BVA and to the System of Justice itself. This officer of the court violated their oath of allegiance to support the U.S. Constitution, [v]iolated Petitioners Constitutional Rights, violated the Due Process of Law on the Administrative Procedures Act, violated the United States Statutes and also violated the state law duty. This officer of the court committed blatant perjury and been the caused of a grave Miscarriage Of Justice when it should be the fountain of Law. The Misrepresentation and misconduct by this officer of the court constitute "Fraud Upon The Court." ***See, e.g. Appendix E page 35-40, and F.***

12. On August 14, and September 28, 2000, upon a recommendation of attorney friends, Petitioner Deynes visited VA to verified his VA veteran file and see for the first time the fabricated sworn statement predicated by the government since 1988.

Moreover, VA never, never notified Deynes that his benefits was curtailed based on a fabricated fraudulent sworn statement prepared by employees' from the Loan Guaranty Division. ***See, e.g. Appendix M page # 55.***

13. On October 31, 2002, Petitioner Deynes firmly stated and affirm on his sworn statement, signed and notarized by attorney Francisco Solis, "that never, never in his life, see or sign the fabricated fraudulent sworn statement" that is part of his veteran file. Moreover, Petitioner Deynes also firmly stated that never, never been notified regarding the decision of the BVA in 1992 by Certified or Registered Mail. ***See, e.g. Appendix N page 56..***

14. On January 10, 2001, Petitioners filed his second Administrative Tort Claim (SF 95 C.F.R. 14.2) with the Department of Veteran Affair whose activities give rise to the claim. Together with the administrative tort claim Petitioner Deynes filed a Motion To Set Aside Opinion And Order due to Fraud Upon The Court By The employees' and officers of the court, and attach with said Motion the Fabricated Fraudulent Sworn Statement predicated by the government since 1988. ***See, e.g. Appendix O page 57-59 and T page 74-78.***

15. On April 4, 2001, Deynes received from Counsel Nancy Robin a letter in reply Petitioner Deynes Motion. On said letter and last page, attorney Robin firmly stated the following relevant issue concerning the fabricated evidence; "the 1987 (no date) statement in the record was a photocopy of the original, it was in Spanish and Notary Seal was stamped on the document." Because of the poor quality of the photocopy, it appears that the veteran signature and the affidavit number were not captures on the photocopy. The Original Sworn Statement Do Not Exist. The only document on Petitioner Deynes file is the fabricated sworn statement prepared and submitted as evidence by Loan Guaranty Division. This document was used exclusively by the government to destroy Petitioners life.

Attorney Robin [v]iolated their oath of allegiance to support the U.S. Constitution and performed a nondiscretionary function, actively conceal its own wrongdoing by misrepresentation and created a breach of duty. This officer of the court has certified bad behavior to continue allowing private law against the rule of law. ***See, e.g. Appendix P page. 60.***

16. On October 21, 2001, Petitioner Deynes filed and couch his complaint under the element of fraud or negligence misrepresentation (in the common law the principle is the same) and cited *Hazel-Atlas Glass Co. v. Hartford Empires Co.*,[3]. Petitioner Deynes have asserted affirmatively that such element of fraud that lies at the epicenter of his complaint its not such element of fraud were relieves the government of tort liability for pecuniary injuries which are wholly attributable to reliance on the government negligence misstatement were preserves sovereign immunity with respect to a broad range of government action. Such fraud its not that fraud were the exception excludes to a wide range of communicative activity including failures of communication and dissemination of false information

---

[3] 322 U.S. 238,64 S. Ct. 997, 1000, 88 L. ed. 1250 ("Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is wrong against the institution set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception of such fraud); *see also* Irtemacnetics America, Inc. et. al. 926 F. 2d 912; Bulloch v. United States, 763 F. 2d 1115, 1121 (10th Cir. 1985); 7 Moore F.P.P. 60.33 and Supp. 60.38(1) 60.398-399.

Such fraud that lies at the epicenter of Petitioners complaint, is fraud perpetrates by officers of the court so that the judicial machinery can not performed in the usual manner its impartial task of adjudging cases that are presented for adjudication. Such fraud is were the court or a members is corrupted or influenced or influence to attempt or where the judges (the administrative judges) has not performed his judicial function. Such element of fraud committed by the government employees' and officers of the court from all this federal agencies has been final so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious that violated the United States Constitution a body of law which are superior to all subsequent statutes.

17. On August 16, 2002, Respondent United States filed a Motion for Summary Judgment. On Respondent Motion, as part of the Statement Of Uncontested Facts in support of that Motion, a total (15 exhibit) were attach but, one of the exhibits filed by Respondent, specifically (exhibit # 3) is the fabricated fraudulent sworn statement were the government has been predicated and used to curtailed Petitioner Deynes benefits. The attorney for Respondent United States performed a nondiscretionary function, actively conceal its own wrongdoing by misrepresentation and created a breach of duty when participated in the fabrication of evidence and with full knowledge proffered this fabricated evidence to the court with the intention undermine the administration of justice. When a lawyer who is an officer of the court, deceive a judge, you have "fraud upon the court."

18. No satisfied with his factual legal action, even when the attorney for Respondent and the lower courts know or reasonable should has known, that a sworn statement that would not considered presented, thereof no sworn, or certified copies of attorney, it's a false fraudulent deceitful inducement and violated the state law duty.

On September 19, 2002, once again the attorney for Respondent United States filed an Informative Motion an PRAY to the lower court to substitute the Spanish fraudulent sworn statement for an English translation this time with crucial aspect in the interpretation and again submitted as evidence. The Petitioners have asserted affirmatively that the attorney for Respondent United States prepared a case on his Motion For Summary Judgment, committed blatant perjury, used the same [e]vidence the government fraudulently has been predicated since 1988 to cover-up misconduct, and require from the court accept as true said document, and for the court to ruled against the law and against the facts the substance of attorney for Respondent [e]vidence were for all legal purpose are fraudulent and null. The attorney for Respondent United States action constitute "fraud upon the court." ***See, e.g. Appendix Q page # 63-69.***

19. On October 4, 2002, Petitioners replied in Opposition and instruct the court that the attorney for Respondent United States submitted as [e]vidence the same fraudulent sworn statement in English version with crucial aspect in the interpretation. The attorney for Respondent United States not only committed the same grossly mistake the government did. The Attorney for Respondent United States consciously, deliberately, fraudulently and malicious altered the [e]vidence to cover the government misrepresentation and misconduct and fraud upon the court. Moreover, on said Motion, Petitioners request that in light of the grave notarial deficiencies and illegalities in the translation, the lower court should act with grave caution in examine, evaluating and/or considering the centerpiece of this controversy and its used in adjudicating the Motion for Summary Judgment filed by Respondent United States. The evidence in the record are undeniable and the Court can corroborate. ***See, e.g. Appendix R page # 70-72.***

20. On April 25, 2003, the lower court ordered Respondent United States to [p]roduce Petitioners Original Sworn Statement the centerpiece of this controversy, and also request the original file with the Loan Guaranty Division on or before May 16, 2003. The court notes (for the first time) that there are multiples court orders to this effect and that the court will not tolerate disobedience of court order. ***Please, see e.g. Appendix S page 73.***

21. On May 15, 2003, Respondent United States submitted Motion in Compliance with court order. On said Motion the Loan Guaranty Division Admitted and Confirm that Petitioner Deynes don't event has a file with said Department. Moreover, the Loan Guaranty Division also Admitted and Confirm (market as exhibit A) that the original sworn statement were the action of Respondent United States has been predicated since 1988 Do Not Exist. ***Please see, e.g. Appendix T page 74-78.***

22. Outrageous, on March 31, 2003 and May 5, 2003 Petitioners received Order and Final Judgment for Lack of Subject Matter Jurisdiction. The lower court acted offensively to impose tyrannical disrespect to the rule by law, acting with prejudice and discrimination to dismiss this claim even when they knows that the attorney for the BVA and attorney for Respondent United States committed "fraud upon the court on both, on the administrative and judicial proceeding. ***See, e.g. Appendix C page # 32-33, and D page # 34.***

The Petitioners have asserted affirmatively that the lower court may not render a judgment which transcends the limits of its authority, and a judgment is void if is beyond the powers granted to the court by the law of its organization, even where the court has jurisdiction over the parties and the subject matter. The Petitioners also have asserted affirmatively that the lower court in this case failed to act in accord with specific mandatory directive and violated the U.S. Constitution, a body of law which are superior to all subsequent statutes.

23. On August 16, 2003 Petitioners appeal the lower court judgment before the United States Court Of Appeal For The First Circuit case 03-1925.

24. On February 5, 2004, Petitioner pro-se filed Motion Requesting Void Order and Judgment under Rule 60(b)(4) due to a proving "fraud upon the court" by attorney for Respondent United States and Substitution of Judge For Cause. On the same dated Petitioner Deynes filed a Motion to Stay before the Appellate Court until the lower court determine Rule 60(b)(4) Motion. The Petitioner have asserted affirmatively that a judgment is void, and therefore subject to relief under Rule 60(b)(4), only if the court that rendered judgment lacked jurisdiction or in circumstances in which the courts action amount to a plain usurpation of power constituting a [v]iolation of process. See *United States v. Bosch Oldsmobile, Inc.*[4].

25. On February 6, 2004, once again the lower court due until February 18, 2004 to reply in opposition to Rule 60(b)(4) Motion. Respondent United States failed to reply because know that her legal argument based on a knowingly false representation of law constitute dishonestly toward the government and to the System of Justice itself. Moreover, the attorney for Respondent United States once again failed to act in accord with specific mandatory directive.

---

[4] 909 F. 2d 657, 661 (1st Cir. 1990); see also Kenner v. C.I.R., 387 F. 3d 689 (1969) (when a court handed down summary judgment based upon well practiced "fraud upon the court", and acted in conflict to infringe and abridge the legal rights and constitutional rights of Plaintiffs; see also, 7 Moore Federal Practices, 2d ed., P. 512, 60. 23.

26. On February 23, 2004, Petitioners filed Motion requesting Disqualification of Judges under 28 U.S.C. Section 455(a). In *United States v. Scinto* [5], the court stated that section 455(a) "requires a judge to recuse himself in any proceeding in which his impartiality might reasonably questioned. Should a judge disqualify himself, them the judge is in violation of Due Process Clause of the U.S. Constitution. ***See, e.g. Appendix U page # 79-81.***

27. Outrageuos, on April 1, 2004, the Court of Appeal affirmed the lower court judgment for lack of subject matter jurisdiction and denied Petitioners Motion to Stay until the district court determine Petitioner Rule 60(b)(4) Motion. ***See, e.g. Appendix A page # 26-28.***

28. On May 6, 2004 the same Judge that Petitioner request be Disqualified under 28 U.S.C. Section 455(a), and in violation of Due Process Clause of the U.S. Constitution deny Petitioner Rule 60(b)(4) Motion, even when he knows that the government and the attorney for Respondent United States committed a proving "fraud upon the court'. The Supreme Court has held that if a Judge wars against the Constitution or if he acts without jurisdiction, he has engaged in treason to the Constitution. ***See, e.g. Appendix V page 82.***

Under Article vi, clause 3 of the U.S. Constitution stated; "every judge or government attorney takes an oath to support the U.S. Constitution. Whenever any judge or government attorney violates the Constitution in the course of performing his/her duties, then that judge or government attorney is acting without lawful authority, has defraud not only Defendant or Plaintiffs, it also defraud the government.

---

[5] 521 F. 2d 842-845 (7th Cir. 1996); *see also* Levine v. United States, 362 U.S. 610, 80 S. Cy. 1038 (1960) (the Supreme Court has ruled and has reaffirmed the principle that "justice" must satisfy the appearance of "justice."); In Maine v. Thiboutot, 100 S. Ct. 250, the Court conclude that "jurisdiction, once challenged, cannot be assumed, it must be decided.

29. The Board of Veteran Appeals Administrative Law Judge attorneys' in 1992 and 2001, the lower court, and Court of Appeal for the First Circuit on his baseless factual legal decisions, are choosing to ignored a fail trial conducted in accordance with fundamental principles of fair play and applicable procedural standards establish by law, which they aware of, but which they will not addresses, because they have consciously chosen to derive their living from Petitioners ongoing suffering, and they don't really care about the Constitution or a limited government. They paid lip service to those words, but their revenue related rulings and decisions have ignored them, and are obvious by more concerned with an expansion of their own agenda under an unauthorized and constitutional expansion of government power. Any power that can be abused will be abused.

30. In Conclusion, the Petitioners have asserted affirmatively that the government employees' and officer of the court "Misrepresentation and Misconduct" constitute fraud upon the court.

IX. REASONS FOR GRANTING THE PETITION

The Petition for writ of certiorari should be granted because the government officer of the court on both on the administrative and judicial proceeding has entered a decision not only in conflict with the decision of another United States Court of Appeals and this Honorable Court on the same important matter; they also violated the intent and purpose of the United States Constitution when admitted and used evidence that for all legal purpose are fraudulent and null.

The United States Court of Appeal for the First Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Honorable Court. We explain:

A. The Administrative Procedure

1. The Petitioners have asserted affirmatively that on October 6, 1989 timely filed a Form 95 (administrative tort claim 28 C.F.R. 14.2) with the Department of Veteran Affair for personal injury, caused by a negligent act of the government employees'. The Petitioner also have asserted affirmatively that section 2401(b(provides that a tort claim against the United States is barred "unless action is begun within six-months after the date of mailing, by Certified Or Registered Mail, or notice of final denial of the claim by the agency to which it was presented. No Notice of final denial was issued to Petitioner Deynes by the Department of Veteran Affair regarding the decision of the Board of Veteran Appeal in July 22, 1992 on his first administrative tort claim dated October 6, 1989 [1].

In conclusion, the Petitioners have asserted affirmatively that timely filed his administrative tort claim in October 6, 1989 and never, never been notified by Certified Or Registered Mail. Thus section 2401(b) does not time bar his FTCA action. Under section 2675(a), Petitioner Deynes may institute his FTCA claim "at any time.". Therefore, having satisfied Congressional standards for presenting a claim under 28 U.S.C. Section 2675, the Petitioners are not barred from litigating their claim in federal court.

---

[1] 28 U.S.C. Section 2675(a) states; "the failure of an agency to make final disposition of a claim within six-months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim. If an administrative claim has been properly filed, section 2675(a) provides that a claimant need not wait longer than six months for the agency to act on his claim before bringing suit pursuant to the FTCA.

B. The United States Court of Appeal For The First Circuit Reversible Decision

When there is a factual question about whether court has jurisdiction, the court may examine fact outside the pleading.

1. The cases cited by the Appellate Court on Petitioner Deynes decision are largely inapposite. For example, the court cites *Magee v. United States* [1], in order to establishes that Petitioners claim fall within the FTCA law of the place. The Petitioners assert that the court committed a reversible error because the facts support liability under the state law.

The first step in assessing the Appellate Court argument is analyzing the language of the FTCA which provides that liability should be determined "in accordance with the law of the place were the act or omission occurred [2]. In *Richard v. United States* [3], in interpreting the law of the place where the act or omission occurred, the Court announce a two-step rule. First, consider the whole law (including choice of law principle) of the place of the negligent. Second, consider any law under that states choice of law rule.

---

[1] 121 F. 3d 1, 6 (ist Cir. 1997) (the Supreme Court has observed that "we have consistently held that Section 1346(b)'s reference to the law of the place means law of the state the source of substantive liability under the FTCA) ; F.D.I.C. v. Meyer, 510 U.S. 471,478, 1145 Ct. 996, 1001 (1994)

[2] 28 U.S.C. Section 1346(b)(1)

[3] 369 U.S. 1 (1962)

The Appellate Court on Petitioner Deynes decision failed to mentioned that the government employees' and officers of the court violated Petitioners Due Process of law, violated the United States Statutes, violated Due Process of Law on the Administrative Procedures Act, violated the United States Constitution and also violated the Puerto Rico choice of law principles and state law choice of law rule, when admitted and used evidence were for all legal purpose are fraudulent and null.. In *Meyer* [4], the Court conclude the "question whether an FTCA claim that is not otherwise barred by Section 2680 is actionable does not turn on whether the government tortfeasor was acting under duty imposed by federal law at the time of the negligence act or omission occurred, or on whether the precise duties governing the conduct of federal employees' ever devolve upon private individual." Instead, the question turns on whether the applicable state law imposes upon private individuals a duty to use due care in analogous circumstances. See, *Art-Metal v. United States* [5].

In conclusion, because the government will often be held liable when a federal employee has violated a mandatory provision of law or regulation. See, *Berkovitz v. United States* [6]. Petitioner Deynes action did not fall within the FTCA's law of the place.

---

[4] 510 U.S. at 477

[5] 753 F. 2d at 1158

[6] 486 U.S. 531 (1988); *see also,* Summers v. United States, 905 F. 2d 1212 (9th Cir. 1990); Dous v. United States, 522 F. 2d 990 (6th Cir. 1975); Griffin v. United States, 500 F. 2d 1059 (3d Cir. 1974); United Airlines, Inc., v. Wiener, 335 F. 2d 379 (9th Cir. 1964).

2. The Appellate Court on Petitioner Deynes decision failed to justify the exercise of subject matter jurisdiction as they did in *Rufino* and many cases. We explain:

In *Rufino Muniz-Rivera v. United States* [7], the plaintiffs requires from the Appellate Court to addresses the parameters of the Federal Tort Claim Acts (FTCA) [8], and, in particular, its misrepresentation and 'discretionary function exceptions'. In *Rufino* the Court outline a "two-prong test" focus on the nature of the conduct as stated in *Berkovitz v. United States* [9]. Because *Rufino* have offered no statutory or regulatory provisions that provides explicit direction regarding such subjects, and the lack of such directives brands the inaction as discretionary. Therefore the court hold that the government negligently failed to warn are barred by the FTCA's misrepresentation exception.

The result of the "discretionary function analysis will be controlled by the plain statement in *Berkovitz*, that if the agencies policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not bar claim that the act was negligent or wrongful. Notwithstanding, on Petitioner Deynes Appeal not only the Appellate Court failed to used the two-prong test on his baseless factual legal opinion, the court also failed to identified the government officers of the court tortuous conduct that caused the harm and created a breach of duty.

---

[7] Court of Appeal for the First Circuit case No. 02-2011

[8] 28 U.S.C. ss. 1346(b) 2671-2680

[9] 486 U.S. 531, 536-37 (1988); *see also,* United States v. Gaubert, 499 U.S. 315, 322-23 (1991); Irving v. United States. 162 F. 3d 154, 162 (1st. Cir. 1998); United States v. Varig Airlines, 467 U.S. 797, 809-10 (1984)

The Court of Appeal for the First Circuit just simply look as the surface of Petitioners Deynes appeals in order to ascertaining the true basis, even when know or reasonably should has known, that the government employees' and officers of the court violate the System of Justice itself. The decision of the appellate court is the result of a misguide focus on trying to preserve the position of the lower court, the attorney for the Board of Veteran Appeal, and the attorney for Respondent United States which seems like to be futile. The Appellate Court unaccountable decision has been final so outrageous because the acting employees' and officers of the court proving tortuous conduct justify the exercise of subject matter jurisdiction.

The FTCA thus instruct the Courts to determines under federal law the question whether Congress has preserved the sovereign immunity of the United States in the circumstances presented by exempting the challenged conduct under 2680. See, *Muniz* [10].

3. The Appellate Court firmly stated that Petitioner Deynes reliance upon *Weldon v. United States* [11] , is misplaced. The Petitioners have asserted affirmatively that the Appellate Court misconstrued *Weldon* case in order to ruled against the law and against the facts. We explain:

Weldon who become ill after receiving a swine flu vaccination, brought a personal injury suit against the United States pursuant to the FTCA [12], et., and the National Swine Flu Immunization Program of 1976. *Weldon v. United States (hereinafter Weldon 1)* [13].

---

[10] 374 U.S. at 164
[11] 745 F. Supp. 408 (N.D.N.Y. (1990) (hereinafter Weldon 1).
[12] 28 U.S.C. 2671-2680
[13] 845 F. Supp. 72, 74 (N.D.C.Y. 1994) (hereinafter Weldon 11).

Concluding that *Weldon* was unable to prove causation, the United States District Court, granted summary judgment in favor of the United States. Nearly three year later, *Weldon* brought an independent equity action pursuant to Rule 60(b) seeking to vacate the summary judgment on the grounds that "the defendant United States committed fraud upon the court both at trial an appellate level. *Weldon 11*..

The Courts found that *Weldon* had "a full and fair opportunity to litigate her present claims in *Weldon 1* during the pendency of which she raised or should have raised her allegations of misrepresentation and misconduct and fraud upon the court. Having found jurisdiction , the district court granted summary judgment in favor of the government, "because all of the claims of misrepresentation and misconduct and fraud upon the court either had been or could has been raised by *Weldon* in the original case (*Weldon 1).*

The Appellate Court committed a reversible error because Petitioner Deynes have been raised his allegations of Misrepresentation and misconduct and fraud upon the court on both, on the administrative and judicial proceeding.

In conclusion, the Petitioners have asserted affirmatively that a decision produced by fraud upon the court is not in essence a decision at all, and never becomes valid. Moreover, the FTCA also permit equitable relief in a action based on assertion of fraud upon the court that are committed even in the course of a suit against the government for Money Damages.

In *Boyle v. United Technologies Corp.*, [14], the Court pointed out that if the agency fail to act in accord with specific mandatory directive, the "discretionary function exception" does not apply.

---

[14] 487 U.S. 500, 108 S. Ct. 250 (1988); *see also* Berkovitz v. United States, 486 U.S. 531, 536 (1988).

C. The Discretionary Function Exception

1. The Federal Tort Claim Act is limited by a number of exceptions pursuant to which the government is not subject to suit, even if a private employer could be liable under the same circumstances. This exceptions include the Discretionary Function Exception, which bars a claim "based upon the exercise or performance" or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused [1].

2. The discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. The discretionary function exception restores the governments' immunity in situations where its employees' are carrying out governmental or regulatory duties [2]. The purpose of the "discretionary function exception" is to protect the ability of the government to proceed with decision making in carrying out its unique and vital functions without second-guessing by the courts as to the appropriateness of its policy choices. See, *United States v. Varig Airlines* [3].

---

[1] 28 U.S.C. 2680(a)

[2] 138 Cong. Rec. S 13982-01, S. Ct. S. 14010(daily ed. Sep. 18, 1992).

[3] 467 U.S. 797, 809-10 (1984) (in the Court World, the basis inquiry concerning the application of the "Discretionary Function Exception" is whether the challenged act of a government employees', whatever his/fer rank are of the nature and quality that Congress intended to shield from tort liability) (to resolved this inquiry, the court first must identify the 'conduct' at issue and then determine whether the 'conduct' is discretionary. See Gaubert, 499 U.S. 315, 322-23 (1991)

3. The Supreme Court has made clear, the appropriate focus is the degree of choice that was in fact available, not to the agency as a whole but to the specific 'acting employee' whose 'conduct' is the basis for the tort action.

4. In examining the nature of the challenged conduct on Petitioner Deynes claim, the Court must first consider whether the action is a matter of choice for the acting employees' an officers of the court. In *Zelenick v. United States* [4], the court noted in dictum; "when the government actively conceals its own wrongdoing by misrepresentation, they may well be equitable reasons for tolling the statute of limitation. In *Lambertson v. United States* [5, states that "in determining the applicability of the 2680(h) exception, a court must look, not to the theory upon which the plaintiffs elect to proceed, but rather to the substance of the claim which he assert.

5. The Petitioners have asserted affirmatively that the government employees' and officers of the court committed misrepresentation and misconduct and fraud upon the court, performed a nondiscretionary function and created a breach of duty when fabricated a sworn statement and used said evidence to destroy petitioners life, make a false statement of material facts or law, offer and used evidence that knows to be illegal and act dishonestly or fraudulently in order to prevail.

---

[4] 770 F. 2d 20, 23 (3d Cir. 1985)

[5] 528 FR. 2d 441, 443 (2d Cir. 1976); *see also,* Guild v. United States, 685 F. 2d 324,325 (9th Cir. 1982)) (explaining that 'the government is liable for injuries resulting for negligence in performance operational task even though 'misrepresentation' are collaterally involved.

6. The Supreme Court also permitted pleading seeking to evade the 'misrepresentation' exception included in 28 U.S.C. Section 2680(h). See, *Block v. Neal* [6] . In *Block* the Supreme Court made clear the 'misrepresentation' does not bar negligence actions which focus not on the government failure to use due care in communicating information, but rather on the government "breach of a different duty." Moreover, in cases where the government is alleged to have committed negligence in the performance of a function such as that performed by a private citizen, rather than in the fulfillment of a broad policy-making duty, them is no discretion in the conduct for the discretionary function to protect and the government is subject to suit. For suit to be brought, the government actor who caused the tort must have been acting within the scope of her/his government employment, and must have been performing a Nondiscretionary Function.

7. Because the evidence in this case permitted this Honorable Court to find, by a preponderance of the evidence, that the officers of the court in this case had no discretion to make independent policy judgments. Accordingly, the district court and Court of Appeal incorrectly concluded that the discretionary function exception bar this FTCA action.

---

[6] 460 U.S. 289 (1983); *see also,* Beroni v. United States, 662 F. 2d 287 (5th Cir. 1981) *cert. denied.,* 460 U.S. 1036 (1983); Kuejci v. U.S. Army Material Development Readiness Command, 773 F. 2d 1278 (7th Cir.), *cert. denied.,* 469 U.S. 918 (1984)

8. Because cases dealing with 'fraud upon the court' turn on whether the improper action are those of parties alone, or if the attorneys in the case are involved (the attorneys for the BVA and the attorney for Respondent United States). As an officers of the court, every attorney has a duty to be completely honest in conducting litigation. Professor Moore emphasizes this element of "fraud" in his treatise[7]. When the party is the government of the United States, acting through the Department of Justice, the distinction between client and attorney actions become meaningless because the government acts only through its attorneys.

9. Because the Petitioners have asserted affirmatively that Dr. Miriam Marty, a psychiatric assigned to the compensation and pension unit of the San Juan VA Medical Center, whose responsibilities include performing disability evaluation examination for adjudication to be conducted by rating board or rating specialist of the Department of Veteran Benefit, performed a disability evaluation to Petitioner Deynes based on a fabricated fraudulent sworn statement were stated that Petitioner been involved in business.

10. Because Dr. Miriam Marty used a fabricated evidence to evaluated Petitioner Deynes and committed an extreme negligence malpractice when failed to make an objective and correct diagnosis on Petitioner emotional condition thus creating a breach of duty due and owed to Petitioner on her one time examination.

---

[7] While an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he/she act dishonestly or fraudulently; on the contrary his loyalty to the courts, as an officer thereof, demands integrity and honest dealing with the court. And when he/she departs from that standard in the conduct of a case, he/she perpetrates "fraud upon the court.".

In Conclusion, the Petitioners have asserted affirmatively that the medical malpractice has been established because the claim accrues, and the statute of limitations begins to run when a reasonable person would know enough to prompt a deeper inquiry into a potential causes. See *Nemmers v. United States*[8]. Moreover, the evidence sustain that the administrative tort claim were timely filed[9].

11. Because the Petitioners have asserted affirmatively that the officers from Disabled American Veteran (DAV) who represent Petitioners throughout the proceeding and which engaged as an attorney at law for all legal purpose, committed severe misrepresentation and omission toward Petitioners by permitting in fraudulent matter the admission of said evidence which for all legal purpose are fraudulent and null. Because DAV consciously, deliberately, intentionally and knowingly committed the same grossly mistake the government did.

Therefore, the subject matter constitute a case in controversy because the government employees' and officers of the court [v]iolates their oath of allegiance to support the United State Constitution and Rule by law, in doing so imposed a manifest injustice so offensive to Petitioners whereby the amendment rights of Petitioners has been violated for failure of the courts to administer due process wherein the instant action, the judges on the administrative and judicial proceeding who ruled to dismiss the cases has committed "fraud upon the court".

---

[8] 795 F. 2d 628, 632 (7th Cir. 1986) (or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice) see United States v. Kubrick, 444 U.S. 111 (1979)

[9] 28 U.S.C. Section 2401(b).

There are no defense by Respondents even by statutes or any law that justify the proving violation of the Constitution and the tortuous conduct of the government employees' and officers of the court. The failure to comply with the law in the burger matter is just another example of the government employees' and officers of the court lack of respect for the law.

Abuse And Usurpation

Find out just what the people will submit to and you have found out the exact amount of injustice and wrong which will be imposed upon them; and these will continue until they are resisted with either words or blows, or with both. The limits of tyrants are prescribes by the endurance of those whom they oppress. If people don't resist the abuses of others, they will have no one to resist the abuses of themselves, and tyranny will prevail.

_____Frederick Douglass, civil rights activist, Aug. 4, 1857

X. CONCLUSION

WHEREFORE, because the government employees' and officers of the court fail to act in accord with specific mandatory directive . The Petitioners very respectfully PRAY to the Honorable Supreme Court, that the petition for a writ of certiorari should be **GRANTED** in the name of justice

RESPECTFULLY SUBMITTED in San Juan, Puerto Rico to Washington D.C. this July 7, 2004

JOSE DEYNES-TORRES et.al.
Attorney Injured and Petitioner
PRO-SE
P.O. Box 8178
Bayamon, Puerto Rico 00960
Tel/Fax: 787-784-6003
Cel: 787-315-7044
e-mail: law55@37.com

APPENDIX A

UNITED STATES COURT OF APPEAL
For the First Circuit

No. 03-1925

JOSE DEYNES-TORRES, ET AL.
Plantiffs, Appellants,

v.

UNITED STATES, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
Hon. Jay A. Garcia-Gregory, U.S. District Judge

Before
Boudin, Chief Judge, Selya and Lipez, Circuit Judges.

Jose Antonio-Deynes Torres on brief pro-se. H.S. Garcia, United States Attorney, Miguel A. Fernandez, Assistant U.S. Attorney, and Lisa E. Bhatia-Gautier, Assistant U.S. Attorney, on brief for appelle United States.

Francisco E. Colon-Ramirez and Colon, Colon & Martinez on brief for appellee Disabled American Veterans.

April 1, 2004

Per Curiam. Plaintiffs appeal from the district court's dismissal of their action for lack of jurisdiction. They contend that the district court erred in determining that the claims against the United States fell within an exception to the government's waiver of sovereign immunity under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. SS. 2671-2680. We disagree.

"The FTCA is a limited waiver of the federal government's sovereign immunity...[I]t specifie[s] several circumstances in which the waiver will not attach. 28 U.S.C. S 2680. "Wood v. United States, 290 F. 3d 29 29, 35 (1st Cir. 2002). If a plaintiff's claims fall within one or more of those exceptions, the "action is outside the ambit of federal subject matter jurisdiction. " Muniz-Rivera v. United States, 326 F. 3d 8, 12 (1st Cir..), cert. denied, _U.S. _, 124 S. Ct. 224 (2003). The district court found that plaintiffs' claims fell within the following exception; any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, **misrepresentation or deceit** , or interference with contract rights. " 28 U.S.C. S 2680(h) (emphasis added).

Plaintiffs have classified their claims as claims of fraud and misrepresentation. The law of Puerto Rico provides the applicable rule of substantive law. See Magee v. United States , 121 F. 3d 1,6 (1st Cir. 1997). In order to prove fraud under Puerto Rico law, a plaintiff must establish: (1) that a false representation was made; (2) that the plaintiff reasonably and foreseeably relied thereon, (3) that the plaintiff was injured by his reliance, and (4) that the defendant intended to defraud the plaintiff. Wodsworth, Inc. v. Schwars-Nin, 951 F, Supp. 314, 323 (D.P.R. 1996).

Examining plaintiffs' claims "through the prism of the FTCA's exceptions, "we conclude that the claim fall within the FTCA's exception for claims of misrepresentation and

deceit. Muniz-Rivera , 326 F. 3d at 12. That exception "insulates the government against liability for conveying false or inaccurate information." Id. At 13, see Beneficial Consumer Discount Co. v. Poltonowicz , 47 F. 3d 91, 96 (3d Cir. 1995) (explaining that "courts have consistently held that fraud claims against the government are not permitted under the FTCA'); Deloria v. Veterans Admin. , 927 F. 2d 1009, 1013 (7th Cir. 1991) (holding that plaintiff's claim that VA records, resulting in the denial of disability benefits, fell within the FTCA exceptions for misrepresentation and deceit).

Plaintiffs' reliance upon Weldon v. United States , 845 F. Supp. 72, 74 (N.D.N.Y. 1994), aff'd 70 F. 3d 1 (2d Cir. 1995), is misplaced. There, the court held that it had ancillary jurisdiction to hear a claim for relief (pursuant to Rule 60(b) from a previous judgment denying plaintiff's FTCA claim. Here, however, there was no previous suit as to which the United States waived its immunity. Therefore, the district court lacked ancillary jurisdiction over this action.

The district court's judgment dismissing plaintiffs' action for lack of jurisdiction is affirmed. Plaintiffs' motion requesting a stay until the district court acts on their Rule 60(b) motion id denied.

Unpublished opinion attached.

Judge Selya is the writing judge.

Thanks.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Jose Deynes-Torres, et.al
Plaintiffs
v.
United State of America, et. al.
Defendants

Civil No. 01-2323(JAG)
Receive and file Feb-6-03

REPORT AND RECOMMENDATION

Before the Court is defendant United States' *Motion for Summary Judgment* (Docket No. 37) and plaintiffs' opposition thereof (Docket Nos. 39, 51). For the reasons stated below, the Court concludes that summary judgment dismissing this action against the United States is warranted for lack of jurisdiction.

In the case at bar plaintiff alleges in his amended complaint (Docket N0. 42) that due to defendants' fraudulent actions, his veterans benefits were reduced in 1992. See Amended Complaint 4,9, 10A. On November 11, 2000, plaintiff, represented by appearing counsel in this case, moved to the Board of Veteran Appeal for a reconsideration of the benefits reduction. See Docket No. 37, Exhibit 14. In said motion, plaintiff, in essence, alleges the same fraudulent scheme object of the present action. See id. On April 4, 2001, said motion was denied by the Board Of Veteran Appeal (BVA). See Docket No. 37, Exhibit 1. This decision apparently was not appealed further.

Plaintiff's claim against defendants, although labeled as one for damages, in reality seeks district court review of the BVA's denial of his motion for reconsideration. Assuming the same is entirely meritorious, judicial review of such claim

lies pursuant to the scheme set forth by the Veteran's Judicial Review Act. See In Re Russell, 155 F. 3d 1012 (8th Cir. 1998). Pursuant to such statutory scheme, appellate review of the BVA's decision must be sought before the U.S. Court of Appeals for Veterans Claims, Court of Appeals for the Federal Circuit and Supreme Court, in said order.

More so, under the Veterans' Review Act, 38 U.S.C. SS 7252(a), all claims arising out of the adjudication of a benefit matter must be pursued via Court of Appeals for Veterans Claims, and not a federal district court. Price v. United States, 228 F. 3d 420 (D.C. Cir. 2001) cert. den. 534 U.S. 903 (2001); Zuspann v. Brown, 60 F. 3d 1156 (5th Cir. 1995), cert. den. 516 U.S. 111 (1996); Sugure v. Derwinski, 26 F. 3d 8 (2d Cir. 1994), cert. den. 515 U.S. 1105 (2d Cir. 1995).

In light of the above, this court has no subject matter jurisdiction to entertain plaintiffs' claim. Rather, jurisdiction over the matter lies in the CVA.

In the alternative, this action for damages must be dismissed as the Federal Tort Claims Act does not apply to actions based on the alleged fraudulent acts of the United States and its officers. See 28 U.S.C. S 2680(h); W.G. Mc Neil v. United States, 6F 3d 343, 348-349 (5th Cir. 1993). The Amended Complaint (Docket No. 42), filed after defendant and plaintiff filed their summary judgment pleadings, alleged fraud on behalf of the United States and its officers[1]. Similarly, plaintiffs own motion for summary judgment (Docket No. 56)[2] alleges fraud on behalf of the defendants. Thus, plaintiffs' tort claims against the United States and its officers fail as a matter of law.

---

[1] The Court notes that plaintiffs in their memorandum in opposition to defendants summary judgment motion (Docket No. 39) at page 10, state that this is an action under the FTCA. [2] This court has recommended that the same be denied. See Docket No. 71.

WHEREFORE, the Court RECOMMENDS that this action be DISMISSED in its entirety against the United States and its officers[3].

Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of the Court within ten (10 days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111 (1986); Davet v. Maccorone, 973 F. 2d, 22, 30-31 (1st Cir. 1992); Patterson-Leitch v. Massachusetts Elec. 840 F. 2d 985 (1st Cir. 1988); Borden v. Secretary of Health and Human Services, 836 F. 2d 4,6 (1st Cir. 1987); Scott v. Schweiker, 720 F. 2d 13, 14 (1st Cir. 1983).

SO RECOMMENDED.

In San Juan, Puerto Rico, this 4th day of February, 2003

(s-) GUSTAVO A GELPI
United States Magistrate-Judge

---

[3] The Court notes that plaintiff insist that he is entitled to further discovery before the court act upon his summary judgment motion. See Docket Nos. 44, 53. Discovery in this instance, however, is unwarranted since the Court lacks subject-matter jurisdiction.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Jose Deynes-Torres, et. Al.
Plaintiff(s) CIVIL NO. 01-2323(JAG)
v. March 31, 2003
United States of America et. al. et. al.
Defendant(s)

ORDER

Pending before the Court is Magistrate Judge Gustavo A Gelpi's Report and Recommendation (Docket No. 72) in which he recommends that co-defendant United States' Motion for Summary Judgment (Docket No. 37) be granted and all claims against that co-defendant be dismissed. The Magistrate Judge submits that plaintiff is in reality requesting that the district court review the Board of Veteran Appeals (BVA) denial for his motion of reconsideration and that such review is precluded by the scheme set forth by the Veterans Judicial Review Act. See, In Re Russell, 155 F. 3d 1012 (8th Cir. 19989). Moreover, the Magistrate Judge states that all claims arising out of the adjudication of a benefit matter must be pursued via the Court of Appeals for Veterans Claims rather than the district court. Plaintiffs' seems to contend that the damages he is claiming are separate and secondary to his reduction in benefits and that his Federal Tort Claims Act is premised upon a fraud upon the court theory (see Docket No. 74 at pg. 7-8). Nonetheless, the Court finds that the Magistrate correctly conclude that the FTCA is not applicable to the alleged fraudulent conduct of the United States.

Inasmuch as the Court agrees with the Magistrate's reasoning and upon review of co-defendants motion for

summary judgment (Docket No. 37), plaintiffs' opposition thereto (Docket No. 44), and plaintiffs' objections to the Magistrate Judge's Report and Recommendation (Docket No. 74), the Court ADOPTS the same and GRANTS co-defendant United States' motion for summary judgment (Docket No. 37).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 31st day of March, 2003

(S-) JAY A. GARCIA GREGORY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Jose Deynes-Torres et. Al.
Plaintiff(s)
v.
United States of America et. al.
Defendant(s)

Civil No. 01-2323(JAG)
Received and filed
May 22, 2003

FINAL JUDGMENT

Pursuant to the Court's Orders dated 31, 2003 and May 5, 2003 respectively, and for the reasons stated therein, this action is dismissed for lack of jurisdiction.

This case is now closed for statistical purposes.

IT IS SO ORDERED
In San Juan, Puerto Rico, this 20th day of May, 2003.

(S.__) JAY A. GARCIA GREGORY
U.S. District Judge

APPENDIX E

IN THE APPEAL
José A. Deynes C 25 362 177

BOARD OF VETERANS' APPEALS
WASHINGTON, D.C. 20420

Docket No. 91-51 734 DATE JUL 22, 1992

THE ISSUE

Entitlement to restoration of a 100 percent disability evaluation for schizophrenic reaction, undifferentiated type, currently rated as 50 percent disabling.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

R. K. Erkembrack, Counsel:

INTRODUCTION

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a rating decision in August 1989 of the Department of Veterans Affairs (VA) Regional Office (RO) at San Juan, Puerto Rico. The veteran served on active duty from April 1968 to April 1970. The notice of disagreement issued in December 1990. The substantive appeal was received in January 1991. The veteran has been represented throughout his appeal by Disabled American Veteran, which presented a statement on the appeal at the RO in November 1991. The appeal was received at the Board in December 1991. Disabled American Veterans submitted additional written argument to the Board in March 1992. The case is now ready for appellate review.

CONTENTIONS

The veteran contents, in substance, that the severity of his psychiatric disability supports restoration of a 100 percent

disability evaluation. He feels that the governing provisions of 38 C.F.R. S 3.344 have been violated. He specifies that the reduction was based on a single examination and, consequently, was improper. He feels that the reduction violated the principles promulgated by the United States Court of Veteran Appeals (Court) in Oppenheimer v. Derwinski , 1 Vet.App. 370 (1991), and Heerdt v. Derwinski, 1 Vet App. 551 (1991). Therefore, it is requested that the total rating be restored from the date of reduction. It is requested that all doubt be resolved in the veterans' favor.

DECISION OF THE BOARD

In accordance with the provisions of 38 U.S.C.A. S 7104 (1991), following review and consideration of all evidence and material of record in the veterans; claims file, and for the following reasons and bases, it is the decision of the Board that the preponderance of the evidence for the service-connected psychiatric disability, or any rating thereof higher than the current 50 percent.

FINDINGS OF FACT

1. All relevant evidence necessary for an equitable disposition of the veterans' appeal has been obtain by the RO.

2. The RO reduced the disability evaluation for schizophrenic reaction, undifferentiated type, from 100 percent to 50 percent effective November 1, 1989; the 100 percent disability evaluation had been in effect since April 2, 1970.

3. The reduced rating was based on a VA Loan Guaranty Report in 1988, a sworn statement of the veteran in 1988, a VA field examination in April 1989 and a VA psychiatric examination in July 1989.

4. The evidence indicated that the veteran had been in the travel agency business since 1975, and in gas station, travel agency and photographic studio businesses since November 1984.

5. The complete evidence shows that schizophrenic reaction, chronic undifferentiated type, has undergone sustained improvement; that it is reasonably certain that the improvement will be maintained under the ordinary conditions of life; and that this improvement has been confirmed on examinations as full and complete as the examinations on which the prior 100 percent disability evaluation was based.

6. On the basis of the VA field and psychiatric examinations, schizophrenic reaction, chronic undifferentiated type, has not been manifest by more than considerable impairment of social and industrial adaptability since 1984.

CONCLUSION OF LAW

The requirements for restoration of a total disability evaluation, or more than a 50 percent disability evaluation, for schizophrenic reaction, chronic undifferentiated type, are not met. 38 U.S.C.A. SS 1155 and 5107(a) (1991); 38 C.F.R. SS 3.342(a), 3.344(a)(b), 3.105(e), 4.125, 4.129, 4.130, 4.132, Diagnotic Code 9204 (1991).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The legal and factual issues presented on the record are: (1) Whether schizophrenic reaction, chronic undifferentiated type, has improved to the point where it is productive of no more than considerable impairment of social and industrial adaptability, under Diagnostic Code 9204, (2) If so, whether the improvement has been sustained and is reasonably certain to be maintained under the ordinary conditions of life?

We find that the veterans' claim is "well-grounded" within the meaning of 38 U.S.C.A. S 5107(a). That is, we find that he has presented a plausible claim. We are also satisfied that all relevant facts have been properly developed. No further assistance to the veteran is required to comply with the duty to assist him mandated by 38 U.S.C.A. S 5107(a).

On the VA psychiatric evaluation report in April 1984, the veteran complained that he had been having severe headaches with intermittent periods of unconsciousness lasting approximately 1 to 2 minutes since 1970. He also referred to vivid, daily recollections of his experiences in Vietnam and of an officer who treated him badly during basis training. He reported that he was unable to tolerate inpatient psychiatric treatment and became worse when he was hospitalized. He had continued treatment at a VA mental health clinic. He took psychotropic medication. The last time ha had been evaluated for his psychiatric illness was in March 1975, when schizophrenic reaction, undifferentiated type, was diagnosed. He had been found competent to handle VA funds.

He had remained married and had two daughters. He had been unable to be gainfully employees after his discharge from the Army. He stated that several years previously he had attempted to start an automobile parts business but had been unable to deal with the public and had had to go out of business. He remained mostly secluded and isolated in his house. He did not visit anyone or have any friends. He was completely distrustful of others. He was unable to relate in an adequate manner. He referred to good relations with his wife and his children.

He related in an apparently adequate manner with his family, but he was very irritable , got angry at the slightest disturbance, and at such times had to leave the house in order to gain control and not turn aggressive against his family.

A VA report dated in March, 1988 indicated information from the VA Loan Guaranty division that the veteran had been in the travel agency business since 1975. His sworn statement indicated that he had been in gas station , travel agency and photographic studio businesses since November 1984.

A VA field examination was completed in April 1989. Some of the veterans' neighbors had seen him only occasionally when he went to visit his parents-in-law. His mother-in-law stated that she did not know much about his business, but that years ago he had had a travel agency in which he worked with his wife and an employee, but that due to a problem that he had had he lost that business. He was in the process of putting in a gasoline station which was not working as yet. He behaved normally. She indicated that before having the travel agency he was not working.

The veteran and his wife were interviewed at the site of a gasoline station that was being built. A large number of worker were laboring on its construction. He stated that his above-referenced sworn statement was correct in that he did have a travel agency, but it had failed. He did not have a travel agency and any other business. The gasoline station which he planned to open was not operating as yet. He indicated that despite the fact that he was working with his wife all the time in the travel agency, she was the person who was actually administering the travel agency.

He reported that he would never be able to forget the experiences that he had in Vietnam. He reportedly had been a prisoner of the Vietnamese for three days after he had been wounded.

It appears obvious from the records as a whole that the veterans' psychiatric status has vastly improved since the examination in April 1984. This is proven by the VA Loan Guaranty Report and the veterans sworn statement in 1988, the VA field examination report in April 1989 and the VA psychiatric evaluation in July 1989. All of this evidence shows that the veteran has been able to pursue substantially gainful employment over a prolonged period of time and has a psychosis in remission. The reduction in this case does not appear to conflict with either Oppenheimer v. Derwinski or Heerdt v. Derwinski. The 100 percent rating had been in effect since April 1970. The above-specified indications

since 1988 were that material and sustained improvement under the ordinary conditions of life, including the active engagement in substantially gainful employment, had taken place. This meets the test of Heerdt.

Hence, the requirements for the benefit sought have not been satisfied. 38 U.S.C.A. SS 1155 and 5107(a); 38 C.F.R. SS 3.343(a), 3.344(a)(b), 3. 105(e), 4.125, 4.129, 4.130, 4.132, Diagnostic Code 9204

ORDER

Restoration of a 100 percent disability for schizophrenic reaction, chronic undifferentiated type, currently rated as 50 percent disabling, is DENIED.

BOARD OF VETERAN APPEALS
Washington, D.C. 20420

(S-) J.E. Day

(S-) M. Wolowitht

(S-) SAMUEL W. WARNER

APPENDIX F

DECLARACION JURADA

(1) En el año 1975 comenzamos negocios como Visi-Tours Travel Agency una Sub-agencia de Visi-Tour de Isla Verde, propieda de Antonio Fosas.

(2) En el 1978 solicitamos permisos a al International Air Transport Association (IATA), compañía que es la que aprueba los permisos para poder operar una agencia de viajes.

(3) El 2 de julio de 1978, fue aprobada bajo el nombre de Ambassador Travel Agency; ubicada en la Avenida Amalia Paoli HR-11 Levittown, Puert Rico.

(4) Logramos levantar una excelente clientela que allá para el año 1978, la compañía Amway P.R. nos declaró agentes oficiales de sus excursiones y convenciones.

(5) En el año 1979 bajo el nombre de Visi-Tour, trabajamos la primera convención de Amway P.R. a St. Thomas, copando a capacidad el Hotel French-Man Reef., con un total de 350 personas.

(6) La agencia creció en gran reputación con la líneas aéreas, que para el año 1980, ya como Ambassador Travel trabajamos una convención a Grand Rapid, Michigan, con un total de 275 personas.

(7) En Mayo de 1980 comenzamos a coordinar lo que sería una de las convenciones a Sto. Domingo, más grande realizadas por una agencia de viajes con un total de 1,000 personas.

(8) Que faltando escasamente semanas para el grupo salir hacia Sto. Domingo, fui relevado por el lider del grupo.

(9) Que el 3 de agosto de 1980 cobramos servicios a Tropical Wing, Inc., por concepto de Avión charter para otra excursión y el mismo devuelto por cuenta cerrada.

(10) Que tanto los gastos que tuvimos para la excursión como comisiones pagadas con cheques devueltos, tuvimos una pérdida de casi $ 20,000.00

(11) Que en julio de 1980 reclutamos de empleado a Amauri López Delgado. Para que se hiciera cargo de la agencia y el mismo se apropió en forma ilegal de la suma de $ 18, 250.00 en tickets vendidos y usados pero no reportados, de diferentes líneas aéreas.

(12) Que todas estas situaciones financieras ocasionaron la cancelación de mi licencia el 20 de marzo de 1981.

(13) En los años 1981 y 1982 continuaban llegando boletos usados, pero no reportados y nosotros haciendo lo imposible para honrar todas esas deudas, vendimos carros, la casa e hicimos esfuerzos sobre-humanos hasta ya más no poder.

(14) A finales del año 1982, pasé por la oficina de un abogado y éste me recomendó acogerme al capítulo 7 en la Corte de Quiebras.

(15) El 20 de mayo de 1983, radiqué un capítulo 7 bajo el número 83-00738 A: el cual hoy día lamento.

(16) En noviembre de 1984 decidí levantarme otra vez, comenzo a desarrollar un proyecto con ayuda de varios asesores, el cual pronto comenzará a surtir efecto.

(17) Que dicho proyecto consiste de una estación de gasolina en combinación de una agencia de viajes y un laboratorio de fotorelevados en una hora. Este proyecto que está aprobado por todas las agencias gubernamentales, que intervienen en este particular.

(18) El 25 de marzo de 1986 le escribí a International Air Transport (IATA), indicándoles (the copy its not clear) solicitar un nuevo permiso y si teniamos algun tipo de deuda que nos dejaran saber para cubrir cualquier compromiso, informándonos que no había deuda.

(19) Que estamos totalmente seguros que IATA nos habrá de expedir el permiso para operar una agencia de viajes.

(20) Que el préstamo personal que aparece a mi nombre con el Chase Maniatan Bank, numero 017050378515, lo

tomé para el uso particular de mi hermano, Melvin Daniel Deynes Torres, y éste lo paga de la misma forma que el financiamiento de auto alquilado a Gelco de Puerto Rico con el contrato número 86164362.

(21) Que en relación al préstamo hipotecario del Caguas Federal que aparece en el listado suministrado por ustedes, deseo manifestar que nunca he tenido deuda o obligación alguna con esa firma bancaria.

EN MERITO DE LO ANTES EXPUESTO, solicito respetuosamente, se me conceda la oportunidad de limpiar el record sobre mi experiencia de pago y en su consecuencia se corrijan aquellas partidas de mi record que no corresponden a mi cuenta. Además en vista de que mi buena experiencia de crédito se vio afectada por la conducta de un empleado, también solicito se me expida un informe de experiencia de pago con una clasificación de pago que me permita iniciar mis nuevos negocios en forma positiva.

Para que así conste firmo la presente en San Juan, Puerto Rico a de abril de 1987.

_____

JOSE A. DEYNES TORRES

AFFIDÁVIT NUMERO: _____

Jurado y suscrito ante mi por Jose A. Deynes Torres, mayor de edad, casado, comerciante y vecino de Bayamón, Puerto Rico.

En San Juan, Puerto Rico, a de abril de 1987.

_____

NOTARIO PUBLICO

The translation of this document with crucial aspect in the interpretation and file by Respondent its on page # 67.

APPENDIX G

FIELD EXAMINATION REQUEST

From: Maritza Ramos –Calvo
Adjudication Officer
Adjudication Division (21)

VA file:25 362 177
Jose A. Deynes
date: 3-17-88

To: Antonio Aponte
Veterans Service Officers
Veterans Service Division (27)

Purpose of this Field Examination:

1. This is a 100% SC veteran in receipt of disability compensation based on and, Schizophrenia, Undifferentiated type since April 2, 1970.

II. Information was received from Loan Guaranty Division showing that veteran has been in business with a travel agency since 1975 (VISI-TOUR TRAVEL AGENCY) and under the name of AMBASSADOR TRAVEL AGENCY on Luly 1979 in Levittown. For more information about this matter, please refer to veteran's sworn statement notarized on April 1987 in file. Also, it was reported in the sworn statement that since November 1984 he has been in business again with a gas station in combination with a travel agency and photo-studio. This new business is apparently named, SUPERSERVICE STATION and is located at Carr. # 2 Km. 20.2 Bo. Candelaria, Toa Baja, Puerto Rico.

III. A field investigation report is requested to determine if above information is correct and to determine the true nature and severity of this veteran's SC nervous condition and his work and employability history and experience.

(S_) Maritza Ramos Calvo

APPENDIX H

REPORT OF FIELD EXAMINATION

Jose A. Deynes 25 362 177 The Social Security Number is incorrect 580-03-9130

Date: 3-17-88
Originating Office: Adjudicating Division
Report maid by: Mr. Nicolas De La Torre
Dated of Report: 4/21/89
Purpose: To find facts about employment
Attachments:
Sworn Statement of The Veteran (April 1987)
Narrative Summary-Clinical Resume (April 5, 1984)
Computer Credit Profile Report (March 16, 1988)
Letter of Veteran (April 10, 1986)
(All documents are in photocopies)
Comments:
Before being assigned to me, this case was in the hands of two other Field Examiners. I received it on February 14, 1989.

On April 18, 19898, I went to the area of the address given the FE requested. The neighbors that I tried to interview indicated that they did not know the veteran or have only seen him occasionally when he goes to visit his parents in law who are the persons residing a the address of the FE request. I then interviewed Miguelina Guzman, the veteran's mother in-law at her residence at calle 22 Bloque 18-1, Sierra Bayamon, Bayamon, P.R. She stated that she did not know much about the business of the veteran, but that years ago he had a travel agency which was worked by him, his wife and an employee, but that due to a problem that he had he loss such.

That he was now in the process of building a gasoline station at Carretera 2 which was not working yet. Upon asking to her about the severity of his nervous condition she only stated that he behaves normal. Regarding his employability history she indicated that before having the travel agency, the veteran was not working in any place. Despite that Miguelina Guzman, who seems over 65 years of age, could not give precise information, she impressed me as a very honest person.

During the same day and after interviewing the veteran's mother in law, I went to Carretera 2 Km. 20.3 Barrio Candelaria, Toa Baja, P.R. and then to the veteran's residence at AV-9 Calle Rio Turabo, Valle Verde, Bayamon, P.R.. The home of the veteran was closed with nobody there. At Barrio Candelaria I observed that a large gasoline self-service station with several pumps, a Texaco sign and two one floors building were still under construction, despite that they gave me the impression that they will be in operation in a few months. A security gurd informed me that the owner was not around. It was in the afternoon and that construction workers had gone.

On April 21, 1989, I went again to the veteran's residence but he and his wife were not at home. I tried to interview neighbors, but in some houses they were not at home and in the other ones they indicated that they did not know who were the veteran and his wife. Then I went to the site of the gasoline station where I interviewed the veteran and his wife. I also, saw a large number of workers working in the construction of the new business. The veteran stated that as indicated in his sworn statement it is correct that he used to have a travel agency which failed.

No Signature:

APPENDIX I

PSYCHIATRIC EXAMINATION REPORT

Name:	Deynes Jose
Age:	40 years
SS:	584-03-9130
Civil Status:	Married
Occupation:	**He is working in a gas station of his own**
Education:	3 years of College
Evaluation Date:	7-789
Informant:	Patient

The veteran interviewed is a 40 y/o male referred by Adjudication Office for a psychiatric review examination and determination of competency with a request that the examiner review the report of the field examination of April 29, 1989. The claim folder of this veteran was provided for that purpose and also his medical records were examined. He came to our offices alone and was interviewed in person.

We are not going to make any commends on the report of field investigation that was performed on April 1989. We examined the whole report in record. The last time that this veteran was interviewed for C&P purposes the examination was done by the undersign on April 5, 1984 and we reported a diagnosis of Schizophrenia Undifferentiated Type Chronic not psychotic and we also found the veteran mentally competent to handle VA funds.

The veteran refer that he is trying to improve his relationship with others, getting involved in the business that he was rights now, of which I am very enthusiastic. He refer that nevertheless he would never be able to forget the experiences that he had in Vietnam. As he himself stated: Those are things that will live with me throughout my life. He states that he was not only wounded in Vietnam but that

he remained prisoner of the Vietnamese for 3 days. He was been evaluated at the Neurology and Cardiology Clinics because he continued experiencing these episodes of headaches accompanied by loss of consciousness but no positive finding were reported. The veteran refers that he has now pending for evaluation with a private physician because even though he was asymptomatic for some time, several weeks ago he had an argument with his wife and he had one of these episodes again..

MENTAL STATUS: The veteran is a well-developed, overweight white male, who comes to the interviewed adequately dressed and groomed. He was alert, aware of the interview situation, aware of the circumstances regarding his present examination and acknowledging the fact that he has been visited by a field investigator from the federal building. His responses were relevant, coherent and logical. He also explained to the examiner about the vivid memories he has regarding his experiences in Vietnam. The fact that he was wounded there was and that he remained a prisoner ther for several days. He is not delusional, he is not hallucinating, he is not overtly suicidal or homicidal. The affect is basically constricted. The mood is hyperactive, tense, apprehensive. He also told the examiner that he is very conscious of the fact that the Travel Agency that he was reported as having before, was not his own but was administered by his wife.

Diagnosis: Shizophrenic Disorder in remiassion. Axis II: None. Axis III: History of headaches accompanied by loss of consciousness. Axis IV: Psychosocial stressors- His combat experiences in Vietnam. Axis V. Level of functioning fair.

COMMENTS:

At the moment of the present interview this veteran is considered mentally competent to handle VA funds.

(S_.) M. Marti, MD

APPENDIX J

SF 95 C.F.R. 14.2
Administrative Tort Claim
Dated: 10-6-89

Submitted to: The Board of Veteran Appeal of the Administration of Veteran
Name: Veteran Jose Deynes, Rio Turabo Au-9 Valle Verde Bayamon, P.R. 00960.
Bases of Claim: The Administration of Veteran committed a grave mistake on veteran Jose Deynes. There is no evidence in the world Ok that certified that he was or been working in travel agency. Somebody committed a grave negligence Ok.

Personal Injury: DAV are going to give you all the information you need.

(S_) by Jose Deynes Torres.

DEPARTMENT OF VETERAN AFFAIR
Regional Office G.P.O Box 4867
San Juan, P.R. 00936

December 9, 1991

C# 25 362 177

Mr. Jose A. Deynes
P.O. Box 8178
Bayamon, P.R. 00621.

Dear Mr. Deynes:

Yours appeal is being certified to the Board of Veterans Appeal for disposition. This means that your records are being transferred to the Board in Washington, D.C. so that the Board can reach a decision on your appeal.

Appeals are considered by the Board as promptly as possible, in docket order. Once the appeal has reached the Board of Veteran Appeals, it takes several months to review it. The time it takes to complete this appellate review process will very depending upon the current backlog at the Board.

If you have requested to appear personally at a hearing before the Board of Veteran Appeals, you will receive further information by separate letter. If you want to appear personally and give testimony concerning your appeal and you have not already requested the hearing, you must submit your request within 90 days of the date of this letter, or by the date that the Board issue a decision in your case, whichever comes first.

As soon as the decision is made, the Board will notify you.
Sincerely yours,

(S_) M. Ramos
Adjudication Officer

APPENDIX K

BOARD OF VETERAN APPEAL
INFORMAL HEARING PRESENTATION

In the Appeal of: Deynes, Jose A. C 25 362 177
Date: March 16, 1992
Represented by: Mr Robert Plante Ent: March 30 1992
Diasabled American Veteran

Transcript of oral arguments for subsequent presentation to and review by the Board section, Board of Veteran Appeals, Washington D.C.
Question At Issue:
"Propriety of the reduction for schizophrenic reaction, undifferentiated type, from 100 percent to 50 percent."
Mr: Plante: An individual review of the file discloses that this veteran served honorably in the United States Army from 4/25/68 to 4/2/70 inclusive. As a direct result of that active military duty, entitlement to service connection was established for achizophrenic reaction., 100 percent under Diagnostic Code 9204 from 4/2/70.

We note that a field examination was requested and conducted concerning the veteran's employment history based on information which was received from the Loan Guaranty Division of the Department of Veteran Affair at the local regional office. The field examination request, VA From 27-3537(a) of 3/17/88 provided that a field investigation report was requested to determine the true nature and severity of this veteran's service-connected nervous condition and his work and his employability history and experience. The 4/21/89 report of field examination and noted by the examiner provided that before being assigned to him, this case was in the hands of two other field examiners. He indicated that he received it on 2/14/89.

More importantly, an exam was conducted on 7/7/89 with respect to the veteran's service-connected disability. An Axis I diagnosis of schizophrenic disorder in remissi , was essentially made by the physician of record. It was also noted during the course of this examination that the veteran's judgment was fair, his insight was very poor and admitted to the physician that the travel agency that he was reported as having before was not his own but was administered by his wife. His level of functioning under Axis V was noted to be fair.

It is obvious that the agency of original jurisdiction has violated the intent and purpose of the regulatory provision of 38 C.F.R. 3.344. The veteran, in effect, was rated 100 percent disabled from 4/2/70, and based on his request for loan guaranty eligibility was investigated, examined, and subsequently reduced after 19 years and 8 months. This reduction was based on one-time examination and subsequently improper. We ask the Board to review the propriety of this reduction based on the evidence of record and taking into consideration the Court of Veterans Appeals decisions in Oppenheimer v. Derwinski and Heerdt v. Derwinski, respectively. The proper procedures in evaluation static disabilities with respect to the veteran's 100 percent evaluation for schizophrenia in effect, violates the regulatory provisions of 38 C.F.R. 3. 344.

We look the Board for a decision which would be representative of sound rating and medical principles consistent with the Department's policy of liberal interpretation and application of existing laws and regulations. We ask that the Board specifically apply the regulatory provisions of 38 C.F.R. 3. 102 and 4.3, respectively, resolving all reasonable doubt in this veteran's favor in order to grant the benefit sought on appeal.

No Signature:

APPENDIX L

VETERAN ADMINISTRATION RATING DECISION

VA file No: 25 362 177
Veteran Name: Jose A. Deynes

NARRATIVE: 38 CFR 3. 105

Report of field survey dated 4-21-89, Department of Veterans Affairs examination mentioned above.

Evaluation of service connected nervous disorder, competency.

Veteran is rated 100% on account of his service connected psychosis. Evidence received shows he has been successfully involve him then operational of a travel agency. This business was operated by veteran and his relatives for a period of several years. Actually he is under process of establishing gasoline station combine with photography laboratory and a travel agency.

SUMMARY OF EVIDENCE AND ADJUDICATIVE ACTIONS

Service: April 25, 1968 to April 1, 1970, honorable.

March 10, 1988: Information was received from the Department of Veteran Affair Loan Guaranty Office with a sworn statement by the veteran of his business.

April 21, 1989: Department of Veterans Affairs Field Examination Report shows that veteran's and his family has been successfully involved in their own business, a travel agency and the veteran is under process to established a gasoline station with a photography laboratory and a travel agency.

July 7, 1989: Department of Veteran Affairs psychiatric examination shows that veteran stated that he does not feel to good now but he will be able to do it with the help of God and in the work that he is trying to improved his relationships with others, getting involved in the business that he has

right now. He still refers that there are some Vietnam memories that always accompany him. His responses were relevant, coherent and logical.
August 23, 1989 : Rating Decision determine that a sustain improvement has been clearly demonstrated in veteran psychiatric disability evaluation from 100% disabling to 50% disabling effective 11-1-89.
September 1, 1989: Veteran was outfited of the proposed action to reduce his disability evaluation from 100% to 50% effective 11-1-89.
October 13, 1989: Notice of Disagreement received with a request for a personal hearing.

DECISION:
1. Veteran service connected nervous disorder is 50% disabling.
REASON FOR DECISION:
1. The evidence of record clearly demonstrated that veteran service connected schizophrenic disorder which is in remission has improved and does not produce more than considerable impairment of social and industrial inadaptability.

Submitted by: (S_) Edgar Cans Dated: 11-9-90
Rating Specialist

Reviewed By: (S__) Mildred Gonzalez Dated: 11-9-90
Chairperson.

APPENDIX M

REPORT OF CONTACT

Department of Veteran Affairs
San Juan Regional Office 25 362 177

Deynes, Jose A. Dated : August 14, 2000

Veteran Jose A. Deynes visited office to review his claim folder. He is requesting copies of documents marked with a tab pertaining to his folder.

Note: If he marked a letter which has multiples pages, he request a copy of the entitle document/letter.

Mr. Deynes picked up the copies at my office on August 16, 2000.

Signed by (S__) Jose Deynes
Signed by (S__) Anna R. Leavell, Management Analyst

APPENDIX N

SWORN STATEMENT

I **Jose Deynes Torres's** legal age, married, social security number **584-03-9130** , unemployment and resident of Rio Turabo Street AU-9, Valle Verde, Bayamon, Puerto Rico, **declare** under oath as follow:

1. That the above personal circumstances are **true** and correct.
2. That never in my life been in a business of **Travel Agency, Photographic Studio** and a **Gas Station** before this fraudulent investigation, never, never.
3. That never in my life was visited by any employee or officer of Veteran Adnistration regarding any investigation. Moreover, never been notified that I was under investigation even from the first two examiner, never.
4. That never in my life been notified regarding that the reduced rating was based on a **VA Loan Guaranty Report and a Sworn Statement** of the veteran in 1988, never.
5. That never in my life **see and sign the fraudulent sworn statement** presented by Loan Guaranty Division to Veteran Administration together with a repot(that report do not exist) in 1988 that was the centerpiece of all the investigation, never, never.
6. That never in my life been notified by Certified Letter from Veteran Administration regarding the decision of the attorney R.K. Erkembrack an administrative Law Judge for the Board of Veteran Appeal on my first Administrative Claim dated July, 22 1992.
7. That the first time I knew about this institutional scam and fraudulent scheme was in July, August and September, 2000, upon recommendation of privates attorneys. Moreover, that was the first time that I see on my file the fraudulent sworn statement.

I suscribe and sworn this statement under oath and good faith, In Cataño, Puerto Rico, this 31 days of October, 2002.

Sign by Jose Deynes Signed by attorney: Francisco Solis
Affidavit Number: 10,960
Seal is stamped:

APPENDIX O

Second Administrative Tort Claim
SF 95 28 C.F.R. 14.2 Prescribed by Dept. of Justice
Personal Injury
Signed by: Jose Deynes, Iris Deynes, Yanice Deynes and Arisdelly Deynes.
Damages; $ 20,000,000.00
Date of filed: 01-10-2001
Attach: Motion to Set Aside Opinion and Order Due to Fraud to the Board Of Veteran Appeal.

BOARD OF VETERANS' APPEALS
WASHINGTON

Docket No: 91-51-734 Dated: November 11, 200
In The Appeal Of Jose Deynes C 25 362 177

MOTION TO SET ASIDE OPINION AND ORDER DUE TO FRAUD UPON THE BOARD

To The Honorable Board:

Comes now Claimant through the undersigned attorney, and respectfully alleges and prays:

1. A decision by the Board of Veterans Affairs was entered on July 22, 1992, Docket No. 91-51-734.
2. The main grounds for said decision resolves around an alleged claimant's sworn statement whereby it expressly stated that claimant was the owner of travel agency and also involved in a gasoline station business.
3. That said sworn statement, copy of which is submitted under oath (Exhibit A), the same was never signed or acknowledged by claimant Jose Deynes. A visual inspection of said document, attest that in the spaces provided to be signed by Jose Deynes in the document, there are no signature whatsoever. Furthermore, in said document there is no affidavit number or signature of the notary public. Only very imprecise or bluried notary stamp's appears

in the document. Said stamp does not identifies the name of the notary public and its venue. (State or country which he is authorized to practice).

4. This affidavit was used exclusively by the field examiner to render its opinion to this Honorable Board, which in turn, used the same to drastically reduced claimant's veteran compensation benefits from full pension rating to a partial rating.

5. In April 18, 1975, the Veteran Administration determined that claimants veteran mental illness was permanent in nature and granted a 100% service connected disability compensation. Barely a few months before his 100% service connected disability permanent became final, and his case was reviewed and his disability rating was reduced to 50%, contrary to the opinion and judgment of Giusti Bravo v, VA (Oct. 15, 1993, U.S. District Court, Civil No. CU 87-00590).

6. On the basis of this situation, which only can be describe as a fraud committed by the filed examiner to this Honorable Court, it is respectfully requested to this Honorable Board that the decision entered on July 22, 1992, be declare null and void. Moreover, it is also requested that benefit since 1989 be reinstalled.

7. Fraud is a terrible offense when committed to an adjudicative body; specifically, in a situation when a officer of said body commits fraud in relation to the main facts, as expressed in this case.

8. The Honorable Board should not only set aside said decision for the same is null and void; but also commence an investigation proceeding with respect to the propriety and soundness of the field examiner's findings which were presented to the Honorable Board. These findings became the major rationale or criteria in this case; and which lead to the partially and substantial curtailment of benefits to the fraudulent affidavit produced in this case as previously expressed.

In Re; Intermagnetic America, Inc., et.al 926 F. 2d 912, while citing Hazel –Atlas Co. V. Hartford Empire Co.. 322 U.S. 238, the Court stated the following: "Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud". See also Pumprey v. KW Thompson Tool, (1995) 9th Cir.)

9. On the basis of the fraud it is respectfully request that the decision entered on July 22, 1992 be set aside and full pension benefits be restores totally permanent in nature since 1989 and with a 100% disability rating. Claimant respectfully also request the payment of interest, cost and attorney fees in the amount of $ 350,000.00 approximately

Respectfully Requested:

(S_) Rafael Oliveras Lopez de Victoria
Claimant Representative

APPENDIX P

DEPARTMENT OF VETERAN AFFAIRS
Board of Veterans' Appeals
Washington D.C. 20420
April 04 2001

Rafael Oliveras Lopez de Victoria
Law Firm
Edificio Asoc. De Maestros, Suite 609
452 Ave. Ponce de Leon
San Juan, P.R. 00918

C 25 362 177
Jose Deynes

Dear Mr. Oliveras:

This letter responds to your motion for reconsideration of the Board's decision of July 22, 1992. The motion was postmarked by the United States Postal Service on November 17, 2000, and received at the Board on November 21. We also are in receipt of your correspondence of November 11,, which was received at the Board on January 25, 2001, via Federal Express. I have been delegated authority to rule on the motion.

A decision of the Board is final unless the Chairman orders reconsideration, or the Board, on its own motion, corrects an obvious error in the record. 38 U.S.C.A. SS 7103, 7104 (West 1991 & Supp. 2000); 38 C.F.R SS 20. 1000,20, 1001 (199). The applicable statutory and regulatory provisions, as well as pertinent judicial precedent, provide that the Chairman of the Board or his delegate has the sole discretion to choose which decisions will be reconsidered. See Matey v. Brown, 37 F. 3d 618, 619-20 (Fed. Cir. 1994), 38 C.F.R. S 20.102(b) (1999).

Under 38 C.F.R. S 20.1000, the discretion of the Chairman or his delegate to grant reconsideration of an appellate decision is limited to the following grounds: (a) upon allegation of obvious error of fact or law; (b) upon discovery

of new and material evidence in the form of relevant records or reports of the service department; or (c) upon allegation that an allowance of benefits by the Board has been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant. You have alleged in essence, that the BVA decision contains an obvious error of fact or law under 38 C.F.R. S 20.1000(a).

The Chairman or his delegate will order reconsideration of an appellate decision upon the ground of "obvious error of fact or law" only when it is shown that it is probable that the Board committed an error in its decision, which, if corrected, would change the outcome of the appeal. Obvious (or clear and unmistakable) error is a very specific and rare kind of error. It is the kind of error of fact or law that, when called to the attention of adjudicators, compels the conclusion, with which reasonable minds could not differ, that the result would have been manifestly different but for the error. Mere allegations that previous adjudicators improperly weighed and evaluated the evidence are inadequate to meet the standard of "obvious error", as are broad-brush allegations of "failure to follow the regulations" or "failure to give due process," or any other general, non-specific claim of error.

The 1987 statement in the record was a photocopy of the original it was in Spanish and a notary seal was stamped on the document. Because of the poor quality of the photocopy, it appear that the veteran's signature and the affidavit number were not captured on the photocopy. In any event, the veteran later confirmed the content of the sworn statement to a VA field examiner, which was also part of the record. The Board did not rely exclusively on the 1987 statement as proof of the veteran's ability to work. The Board in its decision clearly relied on all the evidence of record in deciding the claim.

Your Motion for reconsideration, which has been carefully reviewed in light of the Board's decision in Mr. Deynes' appeal, does not demonstrate that the BVA decision contains

obvious error. The BVA decision at issue contain findings of fact that have a plausible basis in the record; was consistent with the available evidence and applicable statutory and regulatory provisions; and contains clearly stated reasons and bases for the decision. For these reasons, I must deny your motion for reconsideration.

Sincerely yours,

(S_) Nancy R. Robin
Deputy Vice Chairman

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Jose Deynes-Torres et. Al.
Plaintiffs
v.
United States of America, et.al.
Defendants

Civil: 01-2323(JAG)
Dated entered:
September 18, 2002

INFORMATIVE MOTION

To The Honorable Court:

COMES NOW, the United States of America through their undersigned legal counsel and, very respectfully ALLEGES AND PRAYS:

1. On August 16, 2002, the appearing party filed a Motion for Summary Judgment, an Statement of Uncontested Facts, and a Memorandum of Law in Support of Motion for Summary Judgment in the above captioned case.
2. As part of the Statement of Uncontested Facts, a total of fifteen (15) Exhibits were attached to said Motion but, one of the Exhibit filed, specifically Exhibit 3, was submitted in its Spanish language version.
3. Enclosed is a certified translation of said Sworn Statement and, very respectfully from this court, request to be substitute as Exhibit 3 of Defendant's Statement of Uncontested Facts.

WHEREFORE, it is respectfully requested from this Honorable Court that it take notice of the above

(S_) Lisa Bhatia Gautier, Assistant U.S. District Attorney

DECLARACION JURADA

(1) En el año 1975 comenzamos negocios como Visi-Tours Travel Agency una Sub-agencia de Visi-Tour de Isla Verde, propieda de Antonio Fosas.

(2) En el 1978 solicitamos permisos a al International Air Transport Association (IATA), compañía que es la que aprueba los permisos para poder operar una agencia de viajes.

(3) El 2 de julio de 1978, fue aprobada bajo el nombre de Ambassador Travel Agency; ubicada en la Avenida Amalia Paoli HR-11 Levittown, Puert Rico.

(4) Logramos levantar una excelente clientela que allá para el año 1978, la compañía Amway P.R. nos declaró agentes oficiales de sus excursiones y convenciones.

(5) En el año 1979 bajo el nombre de Visi-Tour, trabajamos la primera convención de Amway P.R. a St. Thomas, copando a capacidad el Hotel French-Man Reef., con un total de 350 personas.

(6) La agencia creció en gran reputación con la líneas aéreas, que para el año 1980, ya como Ambassador Travel trabajamos una convención a Grand Rapid, Michigan, con un total de 275 personas.

(7) En Mayo de 1980 comenzamos a coordinar lo que sería una de las convenciones a Sto. Domingo, más grande realizadas por una agencia de viajes con un total de 1,000 personas.

(8) Que faltando escasamente semanas para el grupo salir hacia Sto. Domingo, fui relevado por el lider del grupo.

(9) Que el 3 de agosto de 1980 cobramos servicios a Tropical Wing, Inc., por concepto de Avión charter para otra excursión y el mismo devuelto por cuenta cerrada.

(10) Que tanto los gastos que tuvimos para la excursión como comisiones pagadas con cheques devueltos, tuvimos una pérdida de casi $ 20,000.00

(11) Que en julio de 1980 reclutamos de empleado a Amauri López Delgado. Para que se hiciera cargo de la agencia y el mismo se apropió en forma ilegal de la suma de $ 18, 250.00 en tickets vendidos y usados pero no reportados, de diferentes líneas aéreas.

(12) Que todas estas situaciones financieras ocasionaron la cancelación de mi licencia el 20 de marzo de 1981.

(13) En los años 1981 y 1982 continuaban llegando boletos usados, pero no reportados y nosotros haciendo lo imposible para honrar todas esas deudas, vendimos carros, la casa e hicimos esfuerzos sobre-humanos hasta ya más no poder.

(14) A finales del año 1982, pasé por la oficina de un abogado y éste me recomendó acogerme al capítulo 7 en la Corte de Quiebras.

(15) El 20 de mayo de 1983, radiqué un capítulo 7 bajo el número 83-00738 A: el cual hoy día lamento.

(16) En noviembre de 1984 decidí levantarme otra vez, comenzo a desarrollar un proyecto con ayuda de varios asesores, el cual pronto comenzará a surtir efecto.

(17) Que dicho proyecto consiste de una estación de gasolina en combinación de una agencia de viajes y un laboratorio de fotorelevados en una hora. Este proyecto que está aprobado por todas las agencias gubernamentales, que intervienen en este particular.

(18) El 25 de marzo de 1986 le escribí a International Air Transport (IATA), indicándoles (the copy its not clear) solicitar un nuevo permiso y si teniamos algun tipo de deuda que nos dejaran saber para cubrir cualquier compromiso, informándonos que no había deuda.

(19) Que estamos totalmente seguros que IATA nos habrá de expedir el permiso para operar una agencia de viajes.

(20) Que el préstamo personal que aparece a mi nombre con el Chase Maniatan Bank, numero 017050378515, lo

tomé para el uso particular de mi hermano, Melvin Daniel Deynes Torres, y éste lo paga de la misma forma que el financiamiento de auto alquilado a Gelco de Puerto Rico con el contrato número 86164362.

(21) Que en relación al préstamo hipotecario del Caguas Federal que aparece en el listado suministrado por ustedes, deseo manifestar que nunca he tenido deuda o obligación alguna con esa firma bancaria.

EN MERITO DE LO ANTES EXPUESTO, solicito respetuosamente, se me conceda la oportunidad de limpiar el record sobre mi experiencia de pago y en su consecuencia se corrijan aquellas partidas de mi record que no corresponden a mi cuenta. Además en vista de que mi buena experiencia de crédito se vio afectada por la conducta de un empleado, también solicito se me expida un informe de experiencia de pago con una clasificación de pago que me permita iniciar mis nuevos negocios en forma positiva.

Para que así conste firmo la presente en San Juan, Puerto Rico a de abril de 1987.

_____

JOSE A. DEYNES TORRES

AFFIDÁVIT NUMERO: _____

Jurado y suscrito ante mi por Jose A. Deynes Torres, mayor de edad, casado, comerciante y vecino de Bayamón, Puerto Rico.

En San Juan, Puerto Rico, a de abril de 1987

_____

NOTARIO PUBLICO

TRANSLATION

AFFIDAVIT

1. In 1975 we began business as Visi-Tours Travel Agency, a sub-agency of Visi-Tours Isla Verde, belonging to Antonio Fossas.
2. In 1978 we request permission from the International Air Transport Association (IATA), a company that approves permits for the operation of a travel agency.
3. On July 2, 1979, it was approved under the name Ambassador Travel Agency: located at Avenida Amalia Paoli H8 11. Levittown [sic], Puerto Rico.
4. We were able to raise an excellent clientele around 1978, Amway company named us official agents fro their excursions and conventions.
5. In 1979 under the name of Visi-Tour, we worked the first Amway P.R. convention in St. Thomas, occupaying the entire Hotel French Man-Reef with a total of 350 people.
6. The agency grew in [sic] [with] great reputation among the airlines, which by 1980, since Ambassador Travel had worked a convention in Grand Rapid Michigan, with a total of 275 persons.
7. In may 1980 we began to coordinate what would turn out to be one of the conventions in Sto. Domingo, the largest carried out by a travel agency for a total of [unclear-1000/] people.
8. With barely three weeks for the group taking off Sto. Domingo I was relieved by the group leader.
9. That on August 3, 1980, we charged for services to Tropical Wing, Inc. for Airplane charter for another excursion and it was returned because the account was closed [sic].[cannot determine if reference is made to a check].
10. That as a result of the expenses we had for the excursion and commissions paid with checks that returned we had a loss of nearly $ 20,000.00.
11. That on July of 1980, we recruited employee Amauri Lopez {illegible] to take charge of the agency and he himself

unlawfully misappropriate $ 18,250 in tickets sold and used but not reported to different airlines.
12. That all these financial situations caused the cancellation of my license on March 20 1981.
13. That in the years of 1981 and 1982 used tickets kept on arriving, but unreported and we did the impossible to honor all those debs, we sold house and made extraordinary efforts until we could not do so any longer.
14. Towards the end of 1982, I went by the office of a lawyer and he recommended that I take protection under Chapter 7 in the Bankruptcy Court.
15. On May 20, 1983 I filed a Chapter 7 under number 83-00738 A; which I rue to this day.
16. On November 1984 I decided get up again, I begand to developed a project with the help of several advisors, which soon began to bear results.
17. That project consisted of a gas station combined with a travel agency and a one-hour photo development laboratory. This project is approved by all the government agencies that have to do with this particular.
18. On March 25, 1986, I wrote to International Air Transport (IATA) indicating that we were going to request a new permit and that if we had any kind of debt to let us know to cover any engagement, being told that there was no debt.
19. That we are entirely confident that IATA will issue the permit to operate travel agency.
20. That the personal loan that appears in my name from Chase Manhattan Bank, no. 017050578515 I took out to use specifically for my brother, Melvin Daniel Deynes Torres, and he pays it off just as he does with the financing for the car leased from Gelco Puerto Rico with agreement number 861643562.
21. That regarding the mortgage loan from Caguas Federal that appears on the listing you provided, I wish to state that I've never had any debt or obligation with said banking entity.

WHEREFORE THE PREVIOUS, I respectfully request I be given the opportunity of clearing the record regarding my payment history and that as a result those portions of my record that do not belong to me. Besides in view that my good credit record was affected by the conduct of an ex employee, I also request I be issued a credit payment record with a payment rating that may allow me to initiate my new business' in a positive manner.

A for purposes of the record I sign this hereto in San Juan, Puerto Rico, on April 1987.

Affidavit No._[blank]

[NO SIGNATURE]
JOSE DEYNES TORRES

Sworn and signed before me by Jose A. Deynes Torres, of age, married, a businessman, and resident of Bayamon, Puerto Rico.

[no seal] Public Notary_____

Certified Translation by Moises Hernandez, Federal Court Certified Interpreter.

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Jose Deynes-Torres,et.al.
Plaintiffs
v.
United States Of America, et.al.
Defendants

Case No. 01-2323(JAG)
Entered: 10-4-2002

OPPOSITION AND REPLY TO ORDER AND INFORMATIVE MOTION

TO THE HONORABLE COURT:
COMES NOW, Plaintiffs' through undersigned counsel, and respectfully states and prays:

1. On July 29, 2002, Plaintiff file a Motion Requesting Amendment to Initial Scheduling Memorandum.
2. On August 22, 2002, this Honorable Court denied said amendment for attachments were filed in Spanish and sworn statement must be signed.
3. On 18th of September Co-Defendant United States of America filed a informative motion whereby it submitted as translated documents titled affidavit (Market as exhibit A of this motion).
4. Said document seems to be almost same as the one filed in Spanish in our motion filed on July 29, 2002, market in said motion as Exhibit A. Please corroborate and examine both.
5. In the translate copy, signed by certified translator Mr. Moises Hernandez, there are various crucial aspect in the judicial interpretation of said document, to wit:

A).First, the translated copy submitted by Defendant United States of America States in its heading the title of

"Affidavit", and not the true and correct title "Sworn Statement."

B). The first error in the body of said translate document can be seen in the top page of the first page. A true sworn statement in Puerto Rico to have judicial consequences as authentic document must have the appearance of the sworn signature and his personal circumstances. This must be stated as follow: "I Jose Deynes Torres, of legal age, married to Iris N. Mercado Guzman, veteran pensioner, and resident of Bayamon with Social Security Num. 584-03-9130, appears and declares under oath:"

This statement was never incorporated in said document and therefore Plaintiffs points that fraud was indeed present as stated hereinafter.

C). In addition, the translated document in the third page has no exact date. It only states April 1987. In Puerto Rico, all notarized documents must have the true date in which the same was signed and authenticated. The omission of the exact date is patently seen above the printed name of Jose A. Deynes Torres. Moreover, the exact date of authentication eas not given by the unknown notary public.

D). Fourth, the translated document as well as the original was never signed by Mr. Jose Deynes Torres. This alone constitute our main contention that said document was use as the centerpiece of a fraudulent investigation by officers and medical personnel of the Veterans Administration and its hospital in Puerto Rico.

E). To further demonstrate the illegal use of said document in a institutional fraudulent scan by Veteran Administration, said document was never signed by a notary public. The original copy never attest a signature of notary public.

F). To further demonstrate, said translated document lacks the notarial seal as well the affidavit number which must be present in the same.

G). Lastly, the document is not duly sworn for in no place in the same there is a note subscribed by Jose Deynes that he is

under oath. However, in contradiction to this omission the document states in the authentication by the unknown notary public that Jose Deynes did swomed the same. The document states in the last four lines the following; "Sworn and signed before me by Jose Deyens Torres, of age, married, a businessman and resident of Bayamon, Puerto Rico."

This last statement is untrue for Mr. Deynes never was swomed.

Therefore, in light of these grave notarial deficiencies and illegalities in said translated document this Honorable Court should act with great caution in examining, evaluating and/or considering this document in this case and its use in adjudicating the motion for summary judgment filed by Co-Defendant United States.

Wherefore, again Plaintiff opposes the motion for summary judgment as previously stated in our previous opposition; and light of the above stated notarial illegalities found in said translated document, again Plaintiff request that motion for summary judgment be denied in due to the lack of credibility of said illegal sworn statement. Presently there is a true controversy in the facts presented to this Honorable Court with the and the genuine allegation of extrinsic and intrinsic fraud to both the administrative and judicial system.

Respectfully Requested;

In San Juan, Puerto Rico at 4 days of October, 2002

(S_) Rafael Oliveras Lopez de Victoria
Attorney for Plaintiffs'

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Jose Deyns-Torres,et.al.
Plaintiff(s)
v.
United States Of America, et.al.
Defendant(s)

Civil No. 01-2323(JAG)
Entered: April 29, 2003

ORDER

The Court hereby orders the United States of America to produce plaintiff's original file at the Loan Guaranty Division of the Veterans' Administration on or before May 16, 2003. The Court notes that there are multiple Court orders to this effect (Docket No. 80) and that the Court will not tolerate disobedience of court orders. The First Circuit has condemned parties who fail to comply with court discovery orders and thus derail case management orders. See Fed R. Civ P. 16(f); Tower Ventures, Inc. v. City of Westfield, 296 F. 3d 43,46 (1st Cir. 2002); see also Jones v. Winnepasanke Realty, 990 F. 2d 1,5 (1st Cir. 1993). Trial courts are given "considerable leeway in exercising their admitted authority to punish laggardly or noncompliant litigants." Batiz Chamorro v. P.R. Cars, Inc. 304 F. 3d 1,4 (1st Cir. 2002); see also Cintron-Lorenzo v. Departament de Asuntos del Consumidor, 312 F. 3d 522,526 (1st Cir. 2002). Noncompliance with Court scheduling order constitutes extreme misconduct and warrants the imposition of the harshest sanctions. Torre Ventures, 296 F. 3d at 46; see also Freiria Trading Co., Inc., v. Maizoro S.A. de CV. , 187 F.R.D. 47, 49 (D.P.R. 1999).

IT IS SO ORDERED

In San Juan, Puerto Rico, this 25th day of April, 2003.

(S_) JAY A. GARCIA GREGORY

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Jose Deynes-Torres,et.al.
Plaintiff(s)
v.
United States of America, et. al.
Defendant(s)

Civil No. 01-2323(JAG)
Entered: May 15, 2003

MOTION IN COMPLIANCE WITH ORDER

TO THE HONORABLE COURT:

COMES NOW, Defendant, The United States Of America, represented through its undersigned attorneys and, very respectfully, STAY and PRAY:

Pursuant to the Order entered on April 29 2003, the United States hereby attaches Certification issued by the Veterans Administration to the effect that no records were found concerning any loan data of plaintiffs, and identified as Exhibit "A".

WHEREFORE, the United States very respectfully prays this Honorable Court to take notice of the foregoing for all legal purposes.

RESPECTFULLY SUBMITTED IN San Juan, Puerto Rico, this 15th day of May 2003

(S_) Lisa Bhatia Gautier
Assistant U.S. District Attorney

DEPARTMENT OF VETERAN AFFAIRS
Regional Office
150 Avenue Carlos Chardon-Stc. 232
San Juan, Puerto Rico 00918-1703

Jose Deynes Torres
C 25 362 177
SS 584-03-9130

CERTIFICATION

This is to certify that I am the Loan Guaranty Officer for the San Juan VA Regional Office. I have made a diligent search of Loan Guaranty records and other VA data bases for any information concerning loan data in the subject veterans' record. No loan record or reference of any kind could be found

(S_) DONALD M. LEAVELL
Loan Guaranty Officer

EXHIBIT A

DECLARACION JURADA

(1) En el año 1975 comenzamos negocios como Visi-Tours Travel Agency una Sub-agencia de Visi-Tour de Isla Verde, propieda de Antonio Fosas.
(2) En el 1978 solicitamos permisos a al International Air Transport Association (IATA), compañía que es la que aprueba los permisos para poder operar una agencia de viajes.
(3) El 2 de julio de 1978, fue aprobada bajo el nombre de Ambassador Travel Agency; ubicada en la Avenida Amalia Paoli HR-11 Levittown, Puert Rico.
(4) Logramos levantar una excelente clientela que allá para el año 1978, la compañía Amway P.R. nos declaró agentes oficiales de sus excursiones y convenciones.
(5) En el año 1979 bajo el nombre de Visi-Tour, trabajamos la primera convención de Amway P.R. a St. Thomas, copando a capacidad el Hotel French-Man Reef., con un total de 350 personas.
(6) La agencia creció en gran reputación con la líneas aéreas, que para el año 1980, ya como Ambassador Travel trabajamos una convención a Grand Rapid, Michigan, con un total de 275 personas.
(7) En Mayo de 1980 comenzamos a coordinar lo que sería una de las convenciones a Sto. Domingo, más grande realizadas por una agencia de viajes con un total de 1,000 personas.
(8) Que faltando escasamente semanas para el grupo salir hacia Sto. Domingo, fui relevado por el lider del grupo.
(9) Que el 3 de agosto de 1980 cobramos servicios a Tropical Wing, Inc., por concepto de Avión charter para otra excursión y el mismo devuelto por cuenta cerrada.

(10) Que tanto los gastos que tuvimos para la excursión como comisiones pagadas con cheques devueltos, tuvimos una pérdida de casi $ 20,000.00

(11) Que en julio de 1980 reclutamos de empleado a Amauri López Delgado. Para que se hiciera cargo de la agencia y el mismo se apropió en forma ilegal de la suma de $ 18, 250.00 en tickets vendidos y usados pero no reportados, de diferentes líneas aéreas.

(12) Que todas estas situaciones financieras ocasionaron la cancelación de mi licencia el 20 de marzo de 1981.

(13) En los años 1981 y 1982 continuaban llegando boletos usados, pero no reportados y nosotros haciendo lo imposible para honrar todas esas deudas, vendimos carros, la casa e hicimos esfuerzos sobre-humanos hasta ya más no poder.

(14) A finales del año 1982, pasé por la oficina de un abogado y éste me recomendó acogerme al capítulo 7 en la Corte de Quiebras.

(15) El 20 de mayo de 1983, radiqué un capítulo 7 bajo el número 83-00738 A: el cual hoy día lamento.

(16) En noviembre de 1984 decidí levantarme otra vez, comenzo a desarrollar un proyecto con ayuda de varios asesores, el cual pronto comenzará a surtir efecto.

(17) Que dicho proyecto consiste de una estación de gasolina en combinación de una agencia de viajes y un laboratorio de fotorelevados en una hora. Este proyecto que está aprobado por todas las agencias gubernamentales, que intervienen en este particular.

(18) El 25 de marzo de 1986 le escribí a International Air Transport (IATA), indicándoles (the copy its not clear) solicitar un nuevo permiso y si teniamos algun tipo de deuda que nos dejaran saber para cubrir cualquier compromiso, informándonos que no había deuda.

(19) Que estamos totalmente seguros que IATA nos habrá de expedir el permiso para operar una agencia de viajes.

(20) Que el préstamo personal que aparece a mi nombre con el Chase Maniatan Bank, numero 017050378515, lo tomé para el uso particular de mi hermano, Melvin Daniel Deynes Torres, y éste lo paga de la misma forma que el financiamiento de auto alquilado a Gelco de Puerto Rico con el contrato número 86164362.

(21) Que en relación al préstamo hipotecario del Caguas Federal que aparece en el listado suministrado por ustedes, deseo manifestar que nunca he tenido deuda o obligación alguna con esa firma bancaria.

EN MERITO DE LO ANTES EXPUESTO, solicito respetuosamente, se me conceda la oportunidad de limpiar el record sobre mi experiencia de pago y en su consecuencia se corrijan aquellas partidas de mi record que no corresponden a mi cuenta. Además en vista de que mi buena experiencia de crédito se vio afectada por la conducta de un empleado, también solicito se me expida un informe de experiencia de pago con una clasificación de pago que me permita iniciar mis nuevos negocios en forma positiva.

Para que así conste firmo la presente en San Juan, Puerto Rico a de abril de 1987.

_____

JOSE A. DEYNES TORRES

AFFIDÁVIT NUMERO: _____

Jurado y suscrito ante mi por Jose A. Deynes Torres, mayor de edad, casado, comerciante y vecino de Bayamón, Puerto Rico.

En San Juan, Puerto Rico, a de abril de 1987

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Jose Deynes-Torres,et.al.
Plaintiff(s)
v.
United States of America,et.al
Defendant(s)

Case No. 01-2323(JAG)
Entered: Feb 23, 2004

MOTION REQUESTING DISQUALIFICATION OF JUDGES UNDER 28 U.S.C. SECTION 455(a)

TO THE HONORABLE COURT:

COMES NOW , the Plaintiffs' pro-se in the above caption matter and very respectfully STATES and PRAYS as follow:

1. On February 5, 2004 Plaintiffs' filed Motion Requesting Void Order and Judgment under Rule 60(b)(4) due to fraud upon the court by attorney for Defendant United States and Substitution of Judge for Cause in the above caption case. On February the court due until February 18, 2004 to reply in opposition to said Motion.

2. On February 13, 2004 Co-Defendant DVA filed an opposition without evidence to substantiate his position. Notwithstanding, where is the attorney for Defendant United States who cause the court to be privatized, no independent and manifestly unjust. Where is the attorney for Defendant United States who makes a false statement of material facts of law, and fraudulently mislead the court by making material misrepresentation directly to the court, upon which misrepresentation the court relied. Defendant United States, once again failed to respond because his attorney acted in violation of the Constitution, warred against the government, deprive the court and vitiates the entire proceeding.

On February 19, 2004 the remaining papers was delivered to Honorable Judge Jay Garcia Gregory, apparently to

entertain the 60(b)(4) Motion.. Plaintiffs vigorously opposed because in doing so imposes a manifest injustice and violates their oath of allegiance to support the United States Constitution and Rule by Law.

28 U.S.C 455(a) stated:

Any Judge, or Magistrate Judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

4. Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194 (1988)(what matters is not the reality of bias or prejudice but its appearance); *United States v. Balistrieri,* 779 F. 2d 1191 (7th Cir. 1985) (Section 455(a) is directed against the appearance of partiality, whether or not the judge is actually biased)(Section 455(a), is not intended to protect litigants from actual bias in their judges but rather to promote public confidence in the impartiality of the judicial process)

5. The Court also stated that section 455(a) "requires a judge to recuse himself in any proceeding in which his impartiality might reasonably be questioned. Recusal under Section 455 is self-excecuting; a party need not filed affidavits in support of recusal and the judge is obligated to recuse himself *sua aponte* under the stated circumstances. Further, the judge has a legal duty to disqualified himself even if there no motion asking for his disqualification. The Seventh Circuit Court of Appeals further stated that "We think that this language [455(a)] imposes a duty on the judge to act *sua aponte*, even if no Motion or affidavit is filed. *Balistrieri* 1202.

Judge do not have discretion not to disqualify themselves. By law, they are bound to follow the law. Should a judge not disqualify himself as requires by law, then the judge has given another example of his "appearance of partiality" which, possibly, further disqualifies the judge.

Should another judge not accept the disqualification of the judge, then the second judge has evidenced an "appearance of partiality" and has possibly disqualified himself. None of the orders issued by any judge who has been disqualified by law would appear to be valid. It would appear that they are void as a matter of law, and are no legal force or effect.

7. Should a judge disqualify himself, then the judge is violation of Due Process Clause of the U.S. Constitution. *United States v. Scinto* , 521 F. 2d 842-845 (7th Cir. 1996) (The right to a tribunal free from bias or prejudice is based, not on Section 144, but on the Due Process Clause). The Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice." *Levine v. United Staes*, 362 U.S. 610, 80 S.Ct. 1038(1960).

CONCLUSION

Because Section 455(a) require a judge or magistrate to recuse himself in a proceeding in which his impartiality reasonably be questioned. Plaintiff very respectfully request from this Honorable Court the Disqualification of the Honorable Judge Jay Garcia Gregory and Magistrate Gustavo A. Gelpi, and the Motion Requesting Void Order and Judgment Under Rule 60(b)(4) due to fraud upon the court by attorney for Defendant United States be considered by the Honorable Chief Judge Hector M. Lafite.

RESPECTFULLY SUBMITTED IN San Juan, Puerto Rico, this February 23, 2004

(S_) JOSE DEYNES-TORRE

APPENDIX V

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Jose Deynes-Torres,et. Al.
Plaintiff(s)
v.
United States of America,et. al.
Defendant(s)

Civil No. 01-2323(JAG)
Entered: May 5, 2004

ORDER

Docket Text: ENDORSE ORDER denying[113] Motion to Disqualify Judge, denying[113] Motion to Vacate, noted and moot[114] Motion Requesting Order, denying[116] Motion to Disqualify Judge, denying[116] Motion Requesting Order, finding as Moot[117]Motion requesting order, finding as moot[118 Motion requesting Order, denying[119]Motion to Vacate. Signed by Judge Jay A Garcia-Gregory on 5/5/04.

(S_) JAY A. GARCIA GREGORY